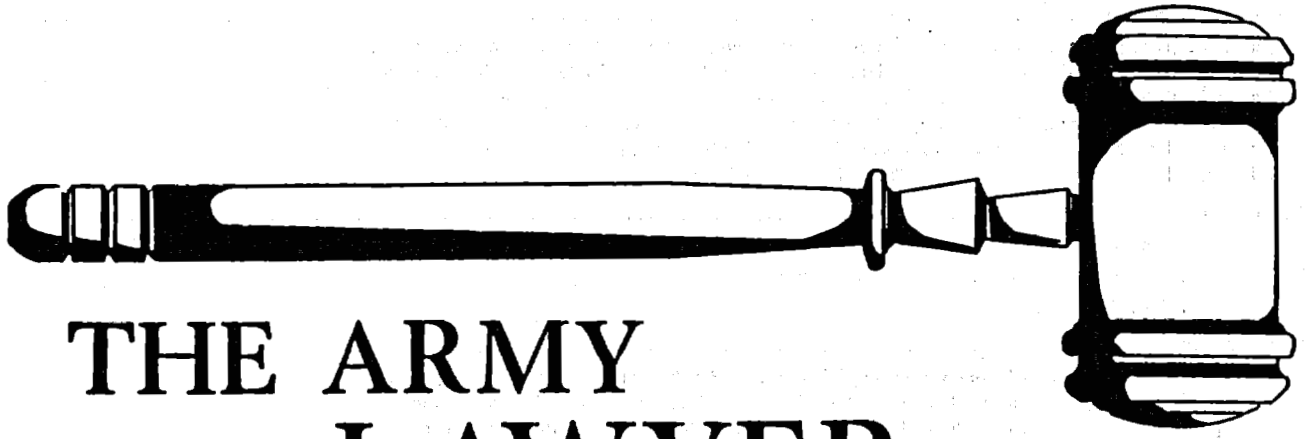

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Captain Matthew E. Winter

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Officer Administrative Eliminations—A System in Disrepair

Major D. Ben Tesdahl
Administrative Law Division, OTJAG

Introduction

Officer administrative eliminations are governed by Army Regulation (AR) 635-100,[1] as supplemented by the resignation provisions of AR 635-120.[2] Although officer eliminations occur less frequently than enlisted eliminations, they tend to be high-visibility cases and often involve field grade officers with many years of service. Therefore, the procedures outlined in the above regulations must be thoroughly understood by all judge advocates, especially those serving as board recorders, legal advisers, defense counsel, staff judge advocates, or administrative law attorneys reviewing elimination proceedings.

Unfortunately, poor organization, sloppy draftsmanship, and numerous ambiguous provisions have resulted in elimination regulations that are extremely difficult to understand. In addition, overly generous due process provisions and numerous layers of administrative review have made the officer elimination system extremely slow and cumbersome.

With the above problems in mind, this article will take a critical look at the officer elimination system,[3] focusing primarily on the involuntary relief from active duty (REFRAD) and elimination provisions contained in AR 635-100, along with the related resignation provisions in AR 635-120. First, the article will provide a brief overview of the officer elimination system. Second, the article will focus on those areas where the elimination regulations are archaic, ambiguous, or incomplete. The article will suggest ways to deal with these problem areas when they arise in the field. Finally, the article will propose revisions to these regulations that could improve and greatly streamline the officer elimination system.

Overview of the Officer Elimination System

To assist those unfamiliar with officer eliminations, the following section will provide a general overview[4] of the applicable regulations, the officer REFRAD procedures, and the officer elimination procedures.

The Applicable Regulations

Historically, one of the biggest challenges facing a judge advocate involved in an officer elimination case was ensuring that he or she had a complete copy of the applicable regulations. For example, at one time AR 635-100 had twenty-seven changes incorporated into the basic regulation and twelve additional interim changes.[5] AR 635-120 was only slightly better, with sixteen changes incorporated into the basic text and two additional interim changes.[6] Now that these regulations have been published in UPDATE form, they should prove to be a much more useful reference tool.

Even with the republication of the above regulations, however, a few problems still exist. For example, the updated regulations were supposed to have all current changes incorporated into the main body of the text. The repealed paragraphs were to be deleted and the remaining paragraphs were to be renumbered accordingly. No substantive changes were supposed to be made. Nevertheless, at some point during the editing phase a number of words were changed or omitted and a number of paragraph cross-references were not correctly renumbered.[7] Perhaps the most glaring of these errors was the total omission of "overweight" as a ground for elimination.[8] Judge advocates in the field should realize that changes and omissions in the current UPDATE form of the regulations are merely administrative errors and are not the result of any conscious policy change.

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[1] Army Reg. 635-100, Personnel Separations: Officer Separations (1 May 1989) [hereinafter AR 635-100]. All citations are to the above version, unless otherwise noted.

[2] Army Reg. 635-120, Personnel Separations: Officer Resignations and Discharges (1 May 1989) [hereinafter AR 635-120].

[3] As used in this article, the term "officer elimination system" is intended to encompass the relief from active duty (REFRAD) and elimination provisions in AR 635-100 as well as the resignation in lieu of elimination and discharge in lieu of elimination provisions in AR 635-120. Resignations for the Good of the Service under AR 635-120, chapter 5, are not included in this article.

[4] For a more detailed discussion of officer eliminations, see Heuer, *Officer Eliminations: A Defense Perspective*, The Army Lawyer, Aug. 1987, at 38. The above article was written prior to the 1988 changes to and 1989 republication of AR 635-100. Therefore, its discussion of probationary and nonprobationary officer elimination procedures is somewhat outdated.

[5] *See* AR 635-100 (C27, 1 Aug. 1982) (I02, 2 July 1988) (superseded).

[6] *See* AR 635-120 (8 Apr. 1968) (I01, 21 July 1988) (superseded).

[7] *See, e.g.*, AR 635-100, para. 3-2d, which should refer to officers with over three years of service; para. 4-10a, which should cross-reference paragraph 5-14c(3); para. 4-10c(1)(d), which should cross-reference para. 4-10b(2); para. 4-14a, which should refer to 30 years of service; para. 5-10, which has completely omitted "overweight" as a ground for elimination; para. 5-18, which should cross-reference paras. 5-14g(3), 5-17, and 5-54; and para. 5-53a, which should cross-reference para. 5-16. There are undoubtedly other errors not listed above. Despite the number of errors, however, no interim change is expected in the near future because of a shortage of publication funds.

[8] *Compare* AR 635-100, para. 5-11i (C27, 1 Aug. 1982) (superseded) *with* the new AR 635-100, para. 5-10. This omission will be corrected upon publication of the next change or update.

Overview of REFRAD

The relief from active duty (REFRAD) of nonregular officers and warrant officers is governed by chapter 3, AR 635-100. These officers may be returned to United States Army Reserve (USAR) or Army-National Guard United States (ARNGUS) control, or they may have their Reserve commissions terminated completely, depending on the applicable grounds for REFRAD.[9]

A Reserve officer's records are constantly being screened by career branch managers, promotion selection boards, and the officer's local commander. If REFRAD is warranted, any of the above can forward an officer's record to the Department of the Army Active Duty Board (DAADB). The officer must be given notice that his or her record is being transmitted to the DAADB for consideration and must be told why the record was submitted. The officer then has the right to submit written comments or rebuttal to the board.[10] In the past, board results have gone to the Secretary of the Army for his personal approval. The new Secretary of the Army, Mr. Stone, has delegated his approval authority in order to speed up the REFRAD process.[11]

Overview of Officer Eliminations

The elimination of Active Army officers and warrant officers from the service is governed by chapter 5, AR 635-100. The primary grounds for elimination are substandard performance of duty, misconduct, moral or professional dereliction, or in the interests of national security.[12]

Probationary Officers

Probationary officers include Regular Army (RA) officers with less than five years' active commissioned service and Reserve component officers with less than three years' commissioned service.[13] Generally, probationary officers are given very few due process rights and can therefore be eliminated relatively quickly and with limited judge advocate involvement.

Typically, a commander will gather evidence of substandard performance or misconduct by a probationary officer and forward that evidence, along with a recommendation for elimination, to the General Officer Show Cause Authority (GOSCA).[14] Normally, the GOSCA will initiate the elimination action by notifying the officer of the ground(s) for the action, the character of discharge recommended, and the officer's right to elect from a number of options.[15] If an Honorable or General Discharge is recommended, the officer has no right to a board of inquiry.[16] The officer does have the right to consult with counsel and submit matters in rebuttal within thirty days.[17] Upon receipt of the officer's rebuttal and option selection (if any), the GOSCA can close the case or forward the case with a recommendation to HQDA.[18] The final decision is made by the Assistant Secretary of the Army (Manpower and Reserve Affairs), who may direct retention, discharge, or referral to a board of inquiry.[19] Because the above procedures are relatively simple, this article will deal with the probationary officer provisions in a limited way.

Nonprobationary Officers

When nonprobationary officers (and certain others)[20] are recommended for elimination, the officer is afforded substantial due process rights. Because this "full" due process includes the right to an administrative board of

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[9] Some of the numerous grounds for REFRAD include: misconduct, moral or professional dereliction, substandard performance of duty; hardship; pregnancy; expiration of active duty commitment; failure to be promoted; and failure to meet standards at a branch orientation course. The term "involuntary REFRAD," as used in this article, refers only to the involuntary REFRAD provisions for misconduct, moral or professional dereliction, or substandard performance under AR 635-100, chapter 3, section XII.

[10] *See generally* AR 635-100, chapter 3, section XII.

[11] According to Mr. John W. Matthews (Deputy Assistant Secretary of the Army, DA Review Boards and Equal Employment Opportunity Compliance and Complaints Review) [hereinafter DASA], the former Secretary of the Army delegated his final approval authority in most officer elimination actions directly to Mr. Matthews, but for some reason, personally reviewed and approved the recommendation of the DAADB in involuntary REFRAD cases. Secretary Stone has now delegated the approval authority in DAADB cases to Mr. Matthews as well, which should speed up the processing of these cases.

[12] AR 635-100, para. 5-1. In addition, an RA probationary officer can be eliminated for failing a service school or when the officer's retention is not in the best interests of the United States. *Id.* para. 5-31a-d.

[13] *Id.* para. 5-30.

[14] The GOSCA is defined as a general officer in command on active duty (other than for training) who has a judge advocate or legal advisor available. The term does not include colonels who are frocked to the rank of brigadier general. *Id.* Glossary.

[15] Although the GOSCA typically initiates the elimination action, an elimination action could be initiated by any of the following: CG, PERSCOM; a GOSCA; the Deputy Chief of Staff for Personnel (DCSPER); the Chief of Staff of the Army; or the Secretary of the Army. *Id.* para. 5-13a. For cases not initiated by the GOSCA, the CG, PERSCOM, is responsible for providing the officer his or her show cause notification. *Id.* paras. 5-14 and 5-32b.

[16] *Id.* para. 5-32b(2)(b).

[17] *Id.* paras. 5-14d and 5-32b(2).

[18] *Id.* para. 5-32b(3). Of course, if an Under Other Than Honorable (UOTH) discharge is warranted, the GOSCA would follow the board procedures for nonprobationary officers. As a practical matter, an Honorable or General discharge will be recommended in almost all probationary officer elimination cases in order to avoid holding a board of inquiry.

[19] *Id.* para. 5-32c(2). The final decision is actually made by Mr. John W. Matthews, DASA. *See supra* note 11.

[20] As previously noted, probationary officers who are recommended for a UOTH discharge also are entitled to full due process, including a board of inquiry. Such cases, however, are rare.

inquiry and several reviews of the board's action, judge advocates play a much more active role. Therefore, this article will deal extensively with problem areas surrounding the full due process provisions of chapter 5.

One of the main concerns of commanders has always been that the full due process provisions for eliminating nonprobationary officers are extremely time-consuming. In past years, for example, it was not unusual to have officer elimination cases take well over a year from initiation to completion.[21] This slow and cumbersome process, using a three-board system of review, resulted in much criticism.

In response, the Senate Armed Services Committee made some recommendations to streamline the elimination system.[22] The resulting legislation amended 10 U.S.C. § 1181 and allowed service Secretaries to prescribe regulations for the review of officer records to determine whether the officer should be required to show cause for retention on active duty.[23] That law became effective in December 1984. Unfortunately, it took the Department of Defense (DOD) more than two years to issue a directive to implement the changes mandated by Congress.[24] That directive required the military services to prescribe officer elimination policies and procedures consistent with the directive. Two-and-one-half years later, the Army finally issued an interim change to AR 635-100 to implement that DOD directive.[25] As a result of that change, now only two boards are required to eliminate nonprobationary officers: a board of inquiry and a board of review.

Once initiated, elimination actions are no longer forwarded to a Department of the Army Selection Board to determine whether the officer should show cause for retention on active duty. Instead, the GOSCA will make that determination. If the case is appropriate for action, the GOSCA notifies the soldier of the ground(s) for the elimination action, the character of discharge recommended, and the right to elect one of the following options within thirty days: resignation or discharge, retirement (if applicable), or a board of inquiry.[26]

If the officer elects to have a board of inquiry, the GOSCA will also act as the convening authority for the board.[27] The board is composed of at least three officers in the grade of 0-6.[28] In certain circumstances, the respondent can also request that a female, minority, or specialty branch officer be appointed to the board.[29] Prior to and during the board, the officer has the right to the following: 1) military counsel of choice; 2) a reasonable time (but not less than thirty days) to prepare the case, review all pertinent records, and obtain the production of documentary evidence and witnesses that are reasonably available; 3) challenge the board members for cause; 4) cross-examine government witnesses; and 5) present rebuttal and argument.[30] The officer also receives a transcript of the completed board proceedings and has the opportunity to submit an appellate brief within seven days.[31] Upon completion of the board and prior to final action by the Secretary of the Army, the board results are reviewed by the GOSCA; the MACOM commander; the PERSCOM commander; and a Department of the Army (DA) Board of Review.[32]

In lieu of a board, an officer will often elect to resign (or retire) under the provisions of AR 635-120. Many commanders mistakenly believe that if an officer resigns in lieu of elimination, the chain of command's recommendation as to the type of discharge is binding on higher authority or, at the very least, of great weight. In reality, however, because of weak factual records and unsupported recommendations, the chain of command's discharge recommendations are disregarded in approximately thirteen percent of the cases.[33] In those cases where the officer receives a worse discharge than that recommended by the chain of command, even a reclama to the PERSCOM commander is futile; the final decision regarding the type of discharge is made by the Secretariat, not the military. The decision is ultimately based solely on the strength of the available record. Therefore,

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[21] Source: Mr. John W. Matthews, DASA.

[22] The Senate Armed Services Committee recommended the abolishment of the DA Selection Board, which had previously reviewed officer elimination cases to determine if they should show cause for retention on active duty. *See* 1984 U.S. Code Cong. & Admin. News, 4205, 4269.

[23] 10 U.S.C. § 1181 (Supp. V 1987).

[24] *See* Dep't of Defense Directive 1332.30, Separation of Regular Commissioned Officer for Cause (12 Feb. 1986) [hereinafter DOD Dir. 1332.30].

[25] AR 635-100 (C27, 1 Aug. 1982) (I02, 2 July 1988) (superseded).

[26] *Id.* para. 5-14.

[27] *Id.* para. 5-15a(3).

[28] *Id.* para. 5-37a.

[29] *Id.* para. 5-37c(3) provides that if the respondent is a minority, female, or special branch officer, the board of inquiry will, upon written request of that officer, include on the board a voting member of that same category, if reasonably available.

[30] *See generally* AR 635-100, para. 5-21 and §§ XI-XII

[31] AR 635-100, para. 5-21e.

[32] *See generally* AR 635-100, § VII-VIII. Once again, the final decision in each case is actually made by Mr. John W. Matthews, DASA. *See supra* notes 11 and 19.

[33] Source: Mr. John W. Matthews, DASA.

judge advocates should advise commanders to ensure that factual allegations are thoroughly documented and that all recommendations are fully justified.[34] To properly advise commanders and alleviate confusion regarding the officer elimination process, judge advocates must be thoroughly familiar with all the procedures in AR 635-100 and AR 635-120.

Problem Areas in the Elimination System

REFRAD (AR 635-100, Chapter 3)

Although chapter 3 has many REFRAD provisions that are relatively straightforward, this section will focus on two specific problem areas: release of officers attending branch orientation courses and involuntary relief from active duty for substandard performance or misconduct (involuntary REFRAD).

Release of Officers Attending Branch Orientation Courses

Officers of the Army National Guard of the United States and the United States Army Reserve with less than three years' commissioned service who fail to meet standards of service schools while attending branch orientation or familiarization courses because of misconduct, moral or professional dereliction, or academic or leadership deficiencies may be released from active duty and discharged from their Reserve commissions.[35] Such cases are referred by the school commandant to a faculty board for consideration and recommendation. The board findings and recommendations are forwarded to the officer exercising general court-martial jurisdiction over the school, who is the final approval authority.[36]

Unfortunately, the regulation is totally silent as to the composition of the faculty board and the extent of any due process procedures. The only guidance is that the officer involved will be permitted to "present to the board any circumstances he considers extenuating."[37] Even this provision is unclear as to whether the officer can be assisted by counsel at his or her own expense. In short, a number of critical issues are left unanswered by the regulation, and this entire area is apparently left to local supplementation by each service school.[38]

By relying on local supplementation, the drafters of this section have created a number of problems. First, local supplementation is likely to create a situation where one service school provides considerably more due process at their faculty boards than do other service schools, possibly violating the equal protection clause.[39] Furthermore, before any board can be held in the first place, school commandants are supposed to advise each officer of the faculty board provisions of AR 635-100. This notice must occur at the "start of each course."[40] There may be some service schools in which the commandant never gives the required notice or attempts to satisfy the notice requirement by a vague reference to faculty boards that is buried in a school pamphlet or other inprocessing materials. Counsel can then argue that the notice requirements of the regulation have been violated and that the board proceedings are a nullity.

Other faculty board provisions are also vague. For example, it is unclear from the regulation whether the general court-martial convening authority (GCMCA) can take action less favorable than that recommended by the faculty board or the school commandant. The most likely answer is that he or she cannot,[41] but this issue needs to

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[34] According to Mr. John W. Matthews, DASA, the major recurring problems with officer elimination packets include the following: character of discharge is not recommended on probationary officers; specificity is lacking or not stated as per paras. 5-10 and 5-11, AR 635-100; specific allegations are not used; officers are not advised of their right to legal counsel; unsworn documents (statements and MFR's) are included in the packet; no evidence is included in the packet; the character of discharge is not recommended on resignations or discharges in lieu of elimination; and enclosures are illegible.

[35] AR 635-100, para. 3-19.

[36] *Id.* para. 3-20. In the case of JAGC officer students, The Judge Advocate General has final approval authority. *Id.*

[37] *Id.* para. 3-21a(2).

[38] For example, the regulation does not address: the minimum number of board members or their rank; the standard of proof; the applicable rules of evidence, if any; the respondent's right to present witnesses or cross-examine government witnesses; and whether the respondent has a right to review the evidence against him or be present during the entire board proceedings. However, local supplementation is common. *See, e.g.*, The Judge Advocate General's School, Reg. 10-2, Policies and Procedures, § ZA-2 (1 May 1989), which contains procedures for faculty boards at The Judge Advocate General's School. Judge advocates supporting school commands should also be aware of the general guidelines for student dismissal contained in Army Reg. 351-1, Individual Military Education and Training, para. 1-10 (15 Oct. 1987).

[39] The fifth amendment due process clause has been interpreted to contain an equal protection element similar to that in the fourteenth amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). Because a disparity in the due process at various faculty boards in the Army would not affect a fundamental right or suspect class, the regulation would only have to satisfy the "rational basis test." *See* Vance v. Bradley, 440 U.S. 93 (1980); McGowen v. Maryland, 366 U.S. 420 (1961). Even that low standard of scrutiny may be difficult to satisfy if different faculty boards provided widely disparate treatment of similarly situated officers. For an example of an equal protection challenge to Air and Army National Guard regulations alleged to contain different amounts of due process for those similarly situated, see Christoffersen v. Washington State Air Nat'l Guard, 855 F.2d 1437 (9th Cir. 1988).

[40] AR 635-100, para. 3-21a(1).

[41] Generally, AR 635-100 precludes the higher authority from taking action less favorable than that recommended by a board. *See, e.g., id.* paras. 5-23d(3) and 5-23e(2)(b).

be addressed in the regulation. Finally, the regulation states that the GCMCA should forward to PERSCOM proceedings in which the final approved action must be considered or executed by HQDA.[42] Nevertheless, there is no way to readily discern what actions fall into the above category. Again, the regulation requires clarification.

An obvious solution to many of the above problems would be to provide in AR 635-100 a simple and uniform set of procedures to be followed by faculty boards at all service schools. It should not be necessary to give notice of these procedures to each officer at the start of the basic course. Also, because extensive due process is generally not required in academic deficiency cases,[43] the board procedures for such cases could be simple and expeditious.

Until such changes are made, judge advocates supporting service schools should carefully review the local supplementation to AR 635-100 to ensure that at least some minimal notice and opportunity to be heard are being provided by the school[44] and that GCMCA's take no action less favorable than that recommended by the faculty board.

Involuntary REFRAD

AR 635-100, chapter 3, section XII, provides that officers will be involuntarily released from active duty upon the recommendation of the DAADB for misconduct, moral or professional dereliction, or when their degree of efficiency and manner of performance or the needs of the service require such action.[45] Except for the absence of any administrative double jeopardy guidance,[46] this involuntary REFRAD provision is relatively complete and straightforward. Nevertheless, section XII also states that, notwithstanding the above provision, an officer who is found guilty by any federal or state court may be released from active duty immediately under two circumstances, both of which present significant problems.

The first circumstance involves conviction of an offense punishable under the Uniform Code of Military Justice (UCMJ) by a maximum penalty of death or confinement for one year or more.[47] In such cases, the regulation is silent as to whether a suspended sentence has any effect.[48] The regulation is also silent about the effect of any pending appeal of the conviction[49] or of any subsequent setting aside of the conviction.[50]

Equally troublesome is the second circumstance, allowing release from active duty for conviction of an offense that "[i]nvolves moral turpitude," regardless of the sentence received or the maximum punishment permissible under any code.[51] Unfortunately, the term "moral turpitude" is not defined in AR 635-100. Thus, unless state law provides some clear definition, the application of this provision is certainly in question. Again, this provision is silent as to the effect of a pending appeal, although it does address convictions that are set aside.[52]

A final problem with both of the above provisions is that the release of the officer is done "immediately."[53] No particular notice or opportunity to submit matters is specifically provided for in the regulation. Because

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[42] AR 635-100, para. 3-20b(4).

[43] *See* Board of Curators v. Horowitz, 435 U.S. 78 (1978), where the court upheld the dismissal of a student for academic deficiency without a hearing. When misconduct is involved, however, courts are more likely to require some minimal due process. *See* Goss v. Lopez, 419 U.S. 565 (1975).

[44] The JAG School's faculty board provisions may be a helpful guide. *See supra* note 38.

[45] This provision is sometimes referred to as "qualitative REFRAD." Qualitative REFRAD should be distinguished from quantitative REFRAD, which results from a reduction in force. *See id.* para. 3-49g. This article will not address quantitative REFRAD issues.

[46] Because of the absence of any administrative double jeopardy provision in Chapter 3 of AR 635-100, the Administrative Law Division, OTJAG, has opined that there is no prohibition against a DAADB considering the same evidence of misconduct previously reviewed by an officer elimination board (although the opposite is not true). *See* DAJA-AL 1989/2715, 20 Oct. 1989. Therefore, when an officer is retained by an elimination board under chapter 5 and his or her command does not support continuation on active duty, judge advocates should be aware that the officer may be REFRAD under chapter 3 using the very same evidence that was not successful at the elimination action. Thus, by using an elimination action first, commanders may get "two bites at the apple." For an example of an officer retained in an elimination action and later REFRAD on the same evidence, see DAJA-AL 1989/2715, 20 Oct. 1989.

[47] *Id.* para. 3-49m(1).

[48] In an enlisted elimination action for conviction by a civil court, a suspended sentence has no effect on the elimination action. *See* Army Reg. 635-200, Personnel Separations: Enlisted Personnel, para. 14-5a(2) (5 July 1984) (C13, 1 Dec. 1988) [hereinafter AR 635-200].

[49] In enlisted elimination actions, a pending appeal of a civil conviction results in the soldier's discharge being withheld until final action has been taken or until the soldier's current term of service expires. *Id.* para. 14-6.

[50] *Compare* AR 635-100, para. 3-49m(2) *with* AR 635-100, para. 3-49m(1).

[51] AR 635-100, para. 3-49m(2).

[52] If the finding of guilty is subsequently set aside, the officer may, with his or her consent and the approval of the Secretary of the Army, be returned to active duty. *Id.*

[53] *Id.* para. 3-49m.

discharge under this provision is discretionary and enlisted soldiers receive some due process in analogous situations,[54] judge advocates should encourage commanders to provide some minimal due process.

In addition to the above drafting problems, the very idea of releasing unacceptable officers from active duty and yet retaining them in the Reserves needs to be reevaluated. With our Reserve forces playing a larger and more important role in rounding out active Army units in wartime, having any unsatisfactory officers in either component is unacceptable.[55] This is especially true in the case of officers convicted of the crimes described above. Therefore, judge advocates should consider discouraging commanders from using the involuntary REFRAD provisions of chapter 3 (except in the most meritorious cases) and should suggest the use of elimination procedures under chapter 5.

Elimination of Officers (AR 635-100, Chapter 5)

Chapter 5 prescribes the procedures to eliminate from the service both probationary and nonprobationary officers in the Active Army. This is the most poorly organized chapter in AR 635-100. This section of the article will focus primarily on the full due process provisions for eliminating nonprobationary officers. Further, three different categories of problems in chapter 5 will be analyzed: those prior to initiation of elimination action, those surrounding the board of inquiry, and those arising after the board of inquiry.

Problem Areas Prior to Initiating Elimination Action

An important issue to resolve prior to initiating an elimination action is whether any double jeopardy has attached to the allegations in question.

Chapter 5 provides that if the findings and recommendations of a prior board of inquiry were obtained by fraud or collusion, an officer may be required to again show cause for retention for that same conduct, even though the prior case resulted in retention.[56] Chapter 5 also provides that grounds for elimination in an earlier case may be joined with new grounds in a later case, provided the earlier elimination proceeding did not include a factual determination specifically absolving the member of the allegation.[57] The structure of paragraph 5-3e(2) suggests that the above two provisions apply to cases involving misconduct, moral or professional dereliction, or in the interests of national security, but not to cases of substandard duty performance.[58] This is probably a drafting error.[59] Judge advocates should take the position that fraud or collusion in any type of elimination action warrants a rehearing on the same allegations. Previous allegations of substandard duty performance can always be coupled with new allegations in order to show a pattern of poor performance over time.

The next consideration is whether the officer is mentally responsible for the conduct that forms the basis of the elimination allegation(s). Chapter 5 states that

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[54] Enlisted soldiers being processed for elimination for conviction by a civil court may be processed under either the notification or administrative board procedure, as appropriate. In either case, the soldiers receive notice and an opportunity to submit matters in their behalf. *See* AR 635-200, chapter 2. In cases of civil conviction, however, due process is probably not constitutionally required before eliminating an employee, because the conviction is an "objective event" upon which employment is conditioned. *See* Ybarra v. Bastian, 647 F.2d 891 (9th Cir. 1981): "[a]n employee with a property interest in continued employment will have that interest extinguished ... in those rare circumstances in which the employee is determined to have what amounts to automatic disqualification for future employment." *Id.* at 893. *Cf.* Dixon v. Love, 431 U.S. 105 (1977); Mackey v. Montrym, 443 U.S. 1 (1979).

[55] AR 635-100, para. 5-33a states:

> In view of the rapidity with which hostilities can now occur and the attendant likelihood that many officers may be called to active duty on short notice, the same standards of efficiency and conduct apply to officers of all components of the Army of the United States.

[56] *Id.* para. 5-3e(2).

[57] *Id.*

[58] AR 635-100, para. 5-3e(2) states:

> An officer may be considered for elimination for misconduct, moral or professional dereliction, or in the interests of national security, at any time subsequent to the closing of the prior case, which resulted in the officer's retention on active duty. However, an officer may not again be required to show cause for retention on active duty solely because of conduct which was the subject of the previous proceedings, unless the findings and recommendations of the Board of Inquiry or Board of Review that considered the case are determined to have been obtained by fraud or collusion. The grounds for elimination in the earlier case may be joined with new grounds in the later case provided the earlier elimination proceeding does not include a factual determination specifically absolving the member of the allegations then under consideration.

Paragraph 5-3e(1), which contains double jeopardy provisions for cases involving substandard performance of duty, does not contain any reference to fraud, collusion, or joining allegations from a prior case. Thus, the implication is that the second and third sentences of paragraph 5-3e(2) only apply to misconduct or dereliction cases, but not substandard performance cases. *See also infra* note 59.

[59] DOD Dir. 1332-30, para. H.2.a., contains a double jeopardy provision with a very similar sentence structure to AR 635-100, para. 5-3e(2), except that there is no mention of joining allegations from a prior case with new allegations. The provision in 10 U.S.C. § 1183c, which appears to be the result of a drafting oversight, was apparently carried over almost verbatim to form the basis of DOD Dir. 1332.30, para. H.2.a. and AR 635-100, para. 5-3e(2). Nevertheless, common sense dictates that fraud or collusion in any elimination case warrants a rehearing on the same allegations. Similarly, commanders often need to combine previous evidence of substandard duty performance with new evidence in order to show a sufficient pattern of poor performance warranting elimination, even though the prior substandard performance evidence may have been used in a previous elimination board that found the allegations justified, but nevertheless voted for retention.

officers will not be processed for elimination under AR 635-100

> if, at the time of the conduct which is the basis of the proceedings, they were not so far free from mental defect, disease, or derangement with respect to the conduct in question as to be able to distinguish right from wrong, or entertain the specific intent which may be required by the conduct at issue, and additionally, to adhere to the right.[60]

This archaic and complex definition is apparently derived from the old *M'Naghten* test,[61] but with the addition of a rather unusual specific intent requirement.

The above definition is not only difficult to understand, but it is also contrary to the Manual for Courts-Martial definition of mental capacity contained in Rule for Courts-Martial (R.C.M.) 706. R.C.M. 706 now states that an individual is mentally responsible for his acts unless, at the time of the conduct, he had a "severe mental disease or defect" and "as a result of such severe mental disease or defect, [was] unable to appreciate the nature and quality or wrongfulness of his or her conduct."[62] In short, R.C.M. 706 requires that the mental disease or defect be a severe one, while chapter 5 does not. Furthermore, R.C.M. 706 no longer has a "volitional prong" to the mental capacity definition, while chapter 5 retains that element. Chapter 5 also requires that the individual have had the ability to entertain any specific intent required by the conduct at issue, while R.C.M. 706 has never contained such a requirement.

Ironically then, an officer could be found mentally unfit to be processed for administrative elimination, but sufficiently responsible to be convicted at a court-martial for the same act of misconduct. Until the regulation is changed to mirror R.C.M. 706, judge advocates should realize that the regulatory definition precludes taking action in a much broader range of cases than does the Manual for Courts-Martial.

Problems Surrounding the Board of Inquiry

Many of the problem areas discussed below could be resolved if chapter 5 clearly stated whether AR 15-6 applied to officer elimination boards. AR 15-6 can be made applicable to boards authorized by other directives, "but only by specific provision in that directive or in the memorandum of appointment."[63] No specific provision exists in AR 635-100. There is only one brief reference to AR 15-6 in the main body of chapter 5, and that reference only involves preparing the board of inquiry's report of proceedings.[64] AR 15-6 is also cited several times in an appendix to AR 635-100.[65] Thus, although it appears that the drafters of chapter 5 intended that at least some portions of AR 15-6 apply to officer elimination boards, the full extent of its application is by no means clear. To alleviate confusion and fill in gaps in chapter 5, judge advocates should ensure that the board of inquiry memorandum of appointment specifically states that the provisions of AR 15-6 apply unless the two regulations conflict.

Another problem area involves the time requirements for board action. For example, after initiation of an elimination action, the GOSCA notifies the officer of his or her options, including the right to appear before a board of inquiry. Unlike the previous provision in chapter 5, which gave nonprobationary officers five days to select an option and seven days to submit matters on their behalf, a 1988 change to chapter 5 now provides both probationary and nonprobationary officers thirty days to accomplish the same thing.[66] It is inconceivable that an officer, especially probationary officers who are generally not entitled to a board, would ever need a full month just to seek legal advice and chose an option. When additional time is factored in for selection of the recorder, identification and notification of board members, selection of a mutually agreeable board date, and other delays,[67] the actual time for a board to convene is likely to be several weeks after the GOSCA's show cause notification.

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[60] AR 635-100, para. 5-7.

[61] M'Naghten's Case, 8 Eng. Rep. 718 (1843):

> [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Id. at 722.

[62] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 706 [hereinafter R.C.M.] (emphasis added).

[63] Army Reg. 15-6, Board, Commissions, and Committees: Procedure for Investigating Officers and Boards of Officers, para. 1-1 (11 May 1988) [hereinafter AR 15-6]. For a detailed discussion of all the recent changes to AR 15-6, see Tesdahl, *The New AR 15-6*, The Army Lawyer, Nov. 1988, at 14.

[64] AR 635-100, para. 5-48a(6).

[65] *See* AR 635-100, App. C.

[66] *Compare* AR 635-100, paras. 5-14(b)(2) and 5-19(b) (C27, 1 Aug. 1982) *with* AR 635-100, para. 5-14(d). Probationary officers used to have seven days after notification to submit matters on their behalf, but they now have thirty days. *Compare id.*, para. 5-30a (C27, 1 Aug. 1982) *with* AR 635-100, paras. 5-32b(2) and 5-14d.

[67] In addition to the thirty-day notice, the recorder must also give nonprobationary officers at least ten days notice prior to the date fixed by the president for the board to convene. AR 635-100, para. 5-36a. The officer also must be allowed additional "reasonable time" to prepare his or her case. *Id.* para. 5-21b. If any additional evidence is discovered by the recorder in preparing the case and that additional evidence raises new allegations not included in the officer's initial notification, that additional evidence is only usable if the GOSCA renotifies the officer of the additional allegation(s). *Id.* para. 5-45b. Presumably, that renotification would entitle the officer to an additional thirty days of preparation time.

Judge advocates could help expedite the process somewhat by having the GOSCA identify a potential recorder, board members, and board date during the thirty days that the officer is selecting an option. Another alternative would be to have a standing list of board members for officer elimination boards. Then, if the officer elects to appear before a board of inquiry, the recorder could be given official orders and could serve the officer with the ten-day notice of the board date.

Even with advance planning, however, a board may be delayed if the respondent requests a female, minority, or special branch board member at the last minute and one has not been previously identified by the GOSCA. Chapter 5 does not specify when an officer must make such a request.[68] In the absence of guidance, judge advocates should take the initiative and help the GOSCA force the selection as early as possible. One way to require early selection is to put a provision in the GOSCA's show cause notification letter that if the officer elects to appear before a board of inquiry, the officer must also indicate at the time of the election whether a female, minority, or special branch member is requested. This gives the officer thirty days to make this decision and provides the GOSCA a firm basis for denying any later request as untimely.

While waiting for the board date to arrive, a common inquiry from board members is whether they may obtain and review a copy of the officer's elimination packet in order to familiarize themselves with the case. Again, chapter 5 contains little guidance on this issue. While one of the recorder's duties is to ensure that "all records and documents referred to the board with the case are furnished to the members thereof," it is unclear when these documents are supposed to be distributed.[69] At the hearing itself, the board president is also supposed to "ensure that the board members ... have examined and studied available documents pertaining to the hearing concerned."[70] Finally, chapter 5 provides that the members of the board "will refresh their memories as to the contents of the records, documents, and reports which were furnished with the case."[71] Taken together, the above paragraphs strongly suggest that a board recorder not only can, but should, distribute the elimination packet to the board members prior to the board hearing. Additionally, the time saved by the members being able to review the case ahead of time would more than outweigh any possible prejudice from inadmissible evidence that may be contained in such packets.

Board members are often unsure of the standard of proof applicable in officer elimination cases. The only guidance in chapter 5 is a mission statement for boards that states that it is the responsibility of the government to "establish by a preponderance of the evidence"[72] that the officer has failed to maintain applicable standards. Unfortunately, the term "preponderance of the evidence" is not defined. In the absence of any definition in the regulation, the standard of proof defined in AR 15-6[73] is probably the best guidance for boards to use.

Chapter 5 is also silent as to what rules of evidence, if any, apply. We do know that the respondent can submit just about any kind of documentation, including unsworn statements.[74] But chapter 5 does not state whether the recorder can do the same, and an argument could be made that he or she cannot.[75] Again, in the absence of guidance, the evidentiary rules of AR 15-6[76] should be used and applied to both sides in the case.

A final ambiguity involves whether a board can convene when the respondent has voluntarily absented himself. The enlisted elimination regulation specifically addresses this issue.[77] The only guidance in AR 635-100 is a statement that the respondent "will be present at all open sessions of the board unless he is excused by the president of the board and expressly waives his right to attend."[78] Thus, the implication seems to be that the board cannot proceed without the respondent, even though the respondent's absence may be voluntary.

Problems After the Board of Inquiry

Upon completion of the board of inquiry, the board's report and the GOSCA's recommendations are forwarded to the MACOM commander. Although chapter 5 allows the MACOM commander to enclose "comments" when forwarding the case to the CG, PERSCOM, the regulation contains no provision preventing the MACOM commander from adding derogatory information that has not been previously provided to the respondent.[79] The

[68] AR 635-100, para. 5-37c(3)(a).

[69] *See id.* para. 5-36b.

[70] *Id.* para. 5-39d.

[71] *Id.* para. 5-38c.

[72] *Id.* para. 5-34.

[73] *See* AR 15-6, para. 3-9b.

[74] *See* AR 635-100, para. 5-39b(9).

[75] *See id.* para. 5-15b, which requires that practically all documentary evidence in the elimination packet be "under oath or affirmation."

[76] *See* generally AR 15-6, para. 3-6.

[77] *See* AR 635-200, figure 2-5, para. 7.

[78] AR 635-100, para. 5-41a.

[79] *See id.* para. 5-23e(2)(c).

GOSCA is specifically prohibited from doing so,[80] and judge advocates should assume that chapter 5 intended the same prohibition to apply to the MACOM commander as well.

Chapter 5 also provides that the DA Board of Review shall make a recommendation regarding the type of discharge. Missing, however, is any provision indicating whether the board of review may recommend a discharge less favorable than that recommended by the board of inquiry.[81] Because the GOSCA and MACOM commander are prohibited from recommending action less favorable than that recommended by the board of inquiry,[82] it should be assumed that the same rule applies to the board of review.

Resignations (AR 635-120)

This section of the article will deal with problems surrounding the two most common types of resignation actions associated with an administrative elimination: resignation in lieu of elimination (AR 635-120, chapter 4) and discharge in lieu of elimination (AR 635-120, chapter 8).

Resignation in Lieu of Elimination (AR 635-120, Chapter 4)

The first obvious problem with chapter 4 is that it has not kept pace with changes to AR 635-100. For example, the introductory paragraph states that the chapter applies to officers who have been selected to show cause by a "Department of the Army Selection Board."[83] As previously noted, the selection board has been eliminated from AR 635-100 and essentially replaced by the GOSCA. Therefore, the above reference to the selection board should be ignored.

AR 635-120 also requires a "first forwarding indorsement" with each officer's resignation.[84] No format for this indorsement, however, is included in the regulation. Judge advocates should design a first forwarding indorsement format for use at their command until one is added to the regulation. Additionally, it is not clear why the resignation format for "substandard performance" contains no provision for seeking the advice of counsel, while the format for "misconduct, moral or professional dereliction, or in the interests of national security" does.[85] Officers resigning under any of the above grounds should have the right to seek the advice of counsel prior to submitting their resignation,[86] despite the wording of the sample formats.

An officer's resignation is generally forwarded through the officer's chain of command for recommendations prior to being forwarded to HQDA.[87] Chapter 4 is silent as to whether any additional information (especially derogatory information not contained in the elimination packet) can be included by the officer's chain of command when they make their recommendations. Nevertheless, because the resignation is separate from the elimination packet and, unlike the elimination action, does not contain factual allegations that the officer has a right to rebut, the chain of command should be able to add comments and derogatory information. Indeed, such information may assist the approval authority in determining the propriety of accepting the resignation.

Finally, chapter 4 is now somewhat ambiguous as to whether an officer facing an elimination for misconduct can receive a discharge under other than honorable (UOTH) conditions. The confusion arises because the names of the possible discharges have been eliminated from chapter 4 and replaced with the DD Form number.[88] DD Form 794A, which previously was used for a UOTH discharge, is no longer listed. Although some counsel have interpreted this change to mean that a UOTH discharge is no longer given in such cases, that interpretation is wrong. DD Form 794A was merely eliminated because that form is now obsolete. A look at the format for a misconduct resignation clearly shows that a UOTH discharge is a possibility.

Discharge in Lieu of Elimination (AR 635-120, Chapter 8)

The only important thing for judge advocates to realize about chapter 8 (which was previously numbered chapter 10) is that it is an outdated provision that should have been rescinded long ago. The main reason chapter 8

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[80] *Id.* para. 5-23d(4).

[81] *See* generally AR 635-100, para. 5-26.

[82] *See id.* paras. 5-23d(3) and 5-23e(2)(b).

[83] AR 635-120, para. 4-1a.

[84] *See id.* para. 2-3d.

[85] Compare *id.* figure 4-1 with *id.* figure 4-2, para. 2. Note that the caption for figure 4-2 should probably use the word "and" instead of "and/or." Otherwise, both figures 4-1 and 4-2 would appear to apply to substandard performance of duty only.

[86] *Id.* para. 4-1d provides: "Officers will be afforded the opportunity to consult qualified legal counsel . . . and will be allowed reasonable time to make a personal decision when resignation is contemplated."

[87] *See* generally *id.* para. 2-3.

[88] *Compare* AR 635-120, para. 4-3 (8 Apr. 1968) (C16, 1 Aug. 1982) (superseded) *with* the new AR 635-120, para. 4-3.

existed at all was that historically, an RA officer could only receive separation pay if he or she was "discharged," but not if the officer "resigned."[89] That provision has since been changed so that any officer with five or more years of service (but less than twenty) who is required to show cause can resign in lieu of elimination and, if otherwise eligible, receive separation pay.[90] Therefore, there is no longer any need for chapter 8. It is expected that it will be eliminated if and when AR 635-100 and AR 635-120 are ever consolidated. Until that time, judge advocates should probably ignore the chapter and process all resignations in lieu of elimination under chapter 4.

Improving the Officer Elimination System

> The government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.[91]

As the above quotation shows, civilian judges are now beginning to recognize what good military leaders have known for years: unacceptable individuals in an organization must be eliminated quickly, before they impair mission accomplishment. This requires a simple and expeditious elimination system that does not involve inordinate amounts of time or assets that could be better devoted to combat readiness. Our present officer elimination system is neither simple nor expeditious and is badly in need of change. The following sections of this article will suggest several levels of change. First, the article will suggest minor changes that could easily be made within the existing regulatory and procedural framework to improve the elimination system. Second, the article will suggest more aggressive changes, incorporating many features of the enlisted elimination regulation in an effort to better streamline officer eliminations. Finally, the article will suggest the most radical change of all, involving a dramatic reduction in due process rights that would also dramatically expedite the elimination process.

Changes Within the Present Elimination System

Perhaps the easiest and most helpful change that could be made without major legislation would be to consolidate and reorganize AR 635-100 and AR 635-120 into one regulation.[92] The ambiguous provisions identified in this article should be clarified, and outdated provisions (e.g., AR 635-120, chapter 8) should be eliminated. This simple change would provide judge advocates with a much more useful reference tool. Better formats for every kind of elimination and resignation action should be included in the regulation. Additionally, schematic diagrams of how each type of action should flow from initiation to final action would be very helpful. The formats would ensure that all paperwork in the elimination (or resignation) packet is uniform and complete, while

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[89] In DAJA-AL 1985/2819, 30 Sept. 1985, the Administrative Law Division, Office of The Judge Advocate General, investigated the historical background of chapter 4 and chapter 10 (now chapter 8), and concluded the following:

> A review of earlier versions of AR 635-120 (AR 635-120, 25 November 1955, as changed, superseded; AR 635-120, 21 May 1962, as changed, superseded) indicates that the separate provisions for a resignation in lieu of elimination and a discharge in lieu of elimination were apparently predicated on the fact that at one time an officer (RA or OTRA) requesting resignation in lieu of elimination could not receive separation pay, although an RA commissioned officer who requested discharge in lieu of elimination would be eligible to receive separation pay (paragraph 3, AR 635-120, 25 November 1955, superseded, DAJA-AL 1977/3470, 9 February 1977). The provision allowing an RA commissioned officer to seek discharge and thus receive separation pay was within paragraph 3, AR 635-120, 25 November 1955 entitled, "Resignation in Lieu of Elimination," (the paragraph's title was changed to "Resignation or Discharge in Lieu of Elimination" by change 1, dated 5 February 1957) until the issuance of AR 635-120, 21 May 1962 when "Resignation in Lieu of Elimination Action" and "Discharge in Lieu of, or as a Result of Elimination Proceedings," were made separate sections (section IV and X, respectively). With the issuance of AR 635-120, 8 April 1968, these provisions were made separate chapters (chapter 4 and Chapter 10, respectively).
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> Currently, neither a request for discharge in lieu of elimination nor a request for resignation in lieu of elimination make either RA or other than RA (OTRA) officers, who are otherwise eligible, ineligible to receive separation pay (10 U.S.C. 1174). As this office is unaware of any distinction between a request for resignation in lieu of elimination and a request for discharge in lieu of elimination (except that only a RA commissioned officer can submit the latter) it appears that the two separate provisions in the current AR 635-120 are merely the result of a continuation of the earlier provisions in use when there were separation pay differences.

[90] *See* Department of Defense Pay and Allowances Entitlements Manual, para. 40411 (9 Mar. 1987) (C15, 1 Oct. 1989) [hereinafter DODPM].

[91] Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part).

[92] Incredible as it may seem, the consolidation of AR 635-100 and AR 635-120 has been in the planning and discussion stages since 1977. *See* DAJA-AL 1977/3470 (9 Feb. 1977).

the diagrams would assist commanders and judge advocates in understanding how paperwork flows within the system.

In addition to the above reorganization, guidelines should be promulgated that restrict the use of involuntary REFRAD actions so our Reserve forces do not become a dumping ground for substandard officers. In addition, the provision for faculty board review of the performance of basic course officers should be moved from chapter 3 (REFRAD) to chapter 5 (elimination). Due process guidelines should be added to the faculty board chapter.

Although the above changes would not make the elimination system much faster, they would make the system easier to understand for commanders and judge advocates alike. Elimination packets would also contain fewer errors and omissions, thereby resulting in fewer packets being returned to the command for corrective action. Although the time saved by the above change may be fairly small, it is nevertheless a step in the right direction.

Changes Based on the Enlisted Elimination System

For some reason, Congress and the Department of Defense have found it necessary to promulgate different standards for the elimination of officers and enlisted soldiers. One has to question the rationality of this double standard. For example, a noncommissioned officer with seventeen years of service certainly has as much at stake in an elimination action as does an active duty Reserve officer with just over three years of service. Nevertheless, the Reserve officer presently receives considerably more administrative due process. Additionally, that extra due process has created an elimination system that is incredibly slow and cumbersome.

One way to expedite and improve the officer elimination process is to borrow many of the best ideas from the administrative board procedure in AR 635-200. For example, once notified of the elimination action by the GOSCA, the officer should be given only seven days (instead of thirty days) to select an option and submit matters in his or her behalf.[93] If the officer fails to respond within seven days, it should be considered a waiver of all rights, to include the right to have the case heard by a board of inquiry.[94] Additionally, an officer should have the opportunity to submit a conditional waiver of the right to a board, with that conditional waiver being decided by the GOSCA.[95] The contingent waiver provision is frequently used in enlisted elimination cases, and there is no reason to believe it would not be a popular alternative in officer elimination cases as well. The provisions of AR 15-6 should also be made explicitly applicable to the board of inquiry, unless it conflicts with some other provision of AR 635-100.[96] Finally, summarized records of board proceedings should be the only type used.[97]

In addition to the above changes, a change should be made to the present requirement that all board members be in the grade of 0-6. Besides the practical difficulties of finding sufficient 0-6 members at most installations,[98] this requirement is overkill in most cases. After all, if an officer's court-martial panel can be composed of officers who are merely senior in grade or rank to the accused,[99] the officer should be subject to a board of inquiry by such officers as well.[100] Female, minority, and special branch members should only be required to sit on the board if they are requested in writing well in advance and if they are reasonably available on the installation.[101]

Upon completion of the board, the GOSCA should be delegated the final approval authority for the board. Although HQDA could be sent a courtesy copy of the

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[93] *See* AR 635-200, para. 2-4f(2).

[94] *Id.*

[95] *Id.* para. 2-5b.

[96] *Id.* para. 2-10e.

[97] *Id.* para. 2-10f. AR 635-100, para. 5-48a, now allows a summarized record of board proceedings. Nevertheless, a verbatim record is often made in officer board cases, thereby unnecessarily wasting a great deal of time and resources.

[98] Many installations do not have a sufficient number of 0-6 officers for officer elimination boards, especially if a minority, female, or special branch officer is requested by the respondent. To make matters worse, no exception is available when there are not enough 0-6 officers available locally. Instead, DOD Dir. 1332-30 has the absurd requirement that in such circumstances, "the Secretary of the Military Department concerned shall complete the membership of the board by appointing retired regular commissioned officers of the same Military Service. The retired grade of such officers must be above lieutenant colonel or commander and must be senior to the grade held by any respondent being considered by the board." *Id.* encl. 4, para. B3.

[99] *See* R.C.M. 503a(1)(discussion) and R.C.M. 912f(1)(k).

[100] The board president should probably be a mature officer of field grade rank, similar to the board president requirement in the enlisted elimination regulation. *See* AR 635-200, para. 2-7a.

[101] *Cf. id.* paras. 2-7b(3) and (5).

action, all intermediate levels of review should be eliminated.[102]

The above proposal should make for a more efficient and expeditious system. The conditional waiver provision alone would probably eliminate the need for many boards; lack of control over the character of discharge[103] is one reason for officers demanding boards and not submitting a resignation in lieu of elimination. Eliminating the MACOM commander, DA Board of Review, and the DASA from the process would also save at least two months in most cases. Finally, because the above system is based on the enlisted elimination system, it could be easily implemented and readily understood by commanders. The main disadvantage to the proposal is that it would require some changes to our present officer elimination statutes and regulations.

Changes Within the Due Process Framework

Although the proposals indicated above would greatly improve the present officer elimination system, even more could be done to expedite the elimination process. In order to do so, however, Congress and the Department of Defense need to realize that the elimination system is merely the Army's way of "firing" our substandard employees. Successful corporations do not provide elaborate due process before eliminating their substandard employees. This final proposal involves simplifying the officer elimination system by limiting due process to the minimum required by the Constitution.

A Brief Overview of Procedural Due Process[104]

In the administrative setting, procedural due process is required whenever the government is adversely affecting an individual's "liberty" or "property" interests.[105] In the public employment setting, property interests are of particular significance. Property interests do not flow from the Constitution, but are created by government statute, regulation, or by contract.[106] For example, one way that governments typically create property interests in the public employment setting is to create a "tenured" employment position (i.e., an employee who can only be fired for "cause"). In *Cleveland Bd. of Educ. v. Loudermill*[107] the Supreme Court held that once a tenured position is created, the employee has a property interest in continued employment and the government must provide some minimal due process before eliminating that employee.[108]

The process that is due depends upon a case-by-case balancing test. The court will balance both the importance of the private interest and the risk of an erroneous deprivation of that interest against the government interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[109] In employment cases, the above test typically results in tenured employees receiving at least

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[102] AR 635-100, para. 5-23a, requires the GOSCA to forward the case to the MACOM within thirty days after the board of inquiry adjourns. The MACOM must then review the case and forward it to the Commander, PERSCOM, within sixty days of board adjournment. The MACOM review is apparently left in the regulation as an extra safety measure to ensure the board findings and recommendations are appropriate and to check once again for legal errors before the case is sent to HQDA. *See id.* paras. 5-23e and f. In the opinion of this author, the MACOM review is a waste of time. Before the elimination action was ever initiated against the officer, the propriety of that action was, no doubt, carefully reviewed by the respondent's battalion commander, brigade commander, and division or corps commander (i.e., the GOSCA), in addition to the installation staff judge advocate. Upon completion of the board of inquiry, their findings and recommendations are also reviewed again by a judge advocate and the GOSCA. It is ludicrous to think that after all those reviews, the elimination action needs any further review by yet another commander and staff judge advocate. For the same reasons, the DA Board of Review should be eliminated from the system.

[103] As a practical matter, a resignation in lieu of elimination is very difficult to revoke once it is submitted. *See* AR 635-120, para. 2-4. Also, once submitted, an officer facing allegations other than substandard performance is subject to any type of administrative discharge, including a discharge Under Other Than Honorable Conditions. *Id.* para. 4-3. On the other hand, an enlisted soldier submitting a conditional waiver can withdraw that waiver at any time prior to final action and has some control over the type of discharge he will be awarded. *See* AR 635-200, paras. 2-4g and 2-5b.

[104] Although a detailed discussion of the development of procedural due process law is beyond the scope of this article, a fuller discussion can be found in Rosen, *Thinking About Due Process*, The Army Lawyer, Mar. 1988, at 3; *see also* B. Schwartz, Administrative Law, chapter 5 (2d ed. 1984).

[105] The due process clause states: "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. In administrative actions, however, a person's life is rarely, if ever, threatened. *See* Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405, 410-11 n.37 (1977).

[106] *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[107] 470 U.S. 532 (1985). For an article discussing the impact of this case on federal civil service employees, see St. Amand, *Probationary and Excepted Service Employee Rights in Disciplinary Actions in the Wake of Cleveland School Board v. Loudermill*, The Army Lawyer, July 1985, at 1.

[108] *See also* Rosen, *supra* note 104, who, after reviewing recent procedural due process case law, concluded:

> Statutes or regulations that condition loss of an entitlement on "cause" or that enumerate the substantive bases that must exist before the entitlement can be withheld or withdrawn create property interests protected by the due process clause. Conversely, statutes or regulations that refer to benefits, such as public employment, as "probationary" or "terminable-at-will" or that provide that receipt of the benefit is at the discretion of some public official, do not create property interests.

Id. at 7 (citations omitted).

[109] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

notice and an opportunity to present matters on their behalf prior to being fired, although they do not necessarily get a full trial-type hearing at that time.[110]

Congress and DOD have created the equivalent of tenure in the officer corps. Specifically, OTRA officers with three or more years of commissioned service and RA officers with five or more years of active service are considered "nonprobationary" officers and can only be eliminated after a "show cause" hearing.[111] Thus, these officers have a property interest in continued employment and can only be eliminated from the service after some procedural due process. Instead of providing these tenured employees with some minimum due process, the government has given them the "full due process" rights previously discussed in this article.[112] Unfortunately, that full due process goes far beyond anything required by *Cleveland Bd. of Educ. v. Loudermill* and is what makes our present elimination system so slow and cumbersome.

Limiting Due Process in the Military

As noted above, Congress and the military have created a property interest for some officers on active duty where none would have otherwise existed.

Total elimination of nonprobationary status (thus eliminating the property interest in employment) is one alternative, albeit a politically unacceptable one. Congress and the military should at least reconsider the period at which "tenure" attaches. For example, we give nonprobationary status to Reserve officers at a very early stage in their career, when most of them have not even completed one tour of duty. Furthermore, we have a different tenure period for Reserve officers and RA officers.[113] None of this makes any good policy sense. Therefore, AR 635-100 could be changed so that active duty officers (whether OTRA or RA) attain nonprobationary status at a much later time in their careers. This would drastically reduce the number of boards of inquiry[114] and limit boards to only those officers who have invested a significant period of their working life to a military career. In addition, those officers who are recommended for a less than honorable discharge (regardless of time in service) should also be given full due process rights. A less than honorable discharge is probably a sufficient "stigma" to implicate a liberty interest, thus requiring some procedural due process.[115]

A second suggestion is that when a board of inquiry is held, due process should be limited to the minimum required by the Constitution. In going through the due process balancing test,[116] a court is likely to find that an elaborate, trial-type hearing is not required before eliminating military officers. Courts have long given deference to the military commander's personnel decisions.[117] Furthermore, the government interest in national security and in maintaining a qualified, combat ready officer corps would be given great weight. The individual interest in remaining on active duty would be much less significant. The risk of an erroneous deprivation of that interest would be small as long as the officer received a reasonable amount of notice and an opportunity to submit matters in person to an impartial board of officers prior to being eliminated. Finally, multiple levels of administrative review are simply not required by the due process clause. The GOSCA should be the final approval authority.

As for officer resignations under AR 635-120, Congress and the military need to reevaluate the present system of awarding separation pay, which appears to reward

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[110] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985); Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985).

[111] *See* AR 635-100, paras. 5-14(c)(4) and 5-30.

[112] *See supra* text accompanying notes 20-34.

[113] *See supra* text accompanying note 111.

[114] The majority of officer elimination cases involve officers below the grade of 0-4.

[115] It is unclear from the available federal case law whether giving an officer a less than honorable discharge implicates a liberty interest that requires due process. Unlike property interests, liberty interests generally flow directly from the Constitution itself. *See* Herman, *The New Liberty: The Procedural Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. Rev. 482, 502 (1984). To establish a liberty interest (and thus the right to a hearing), a public employee must show that he or she was stigmatized in connection with an alteration of his or her legal status as employee, allege that the stigma arose from substantially false characterizations of the employee or the employee's conduct, and demonstrate that the damaging characterizations were made public through channels other than by litigation initiated by the employee. Note, *Developments in the Law — Public Employment*, 97 Harv. L. Rev. 1612, 1789 (1984); *see also* Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976). The second prong of the above test is difficult for many employees to establish. *See, e.g.*, Codd v. Velger, 429 U.S. 624 (1977)(per curiam); Pollack v. Baxter Nursing Home, 706 F.2d 236 (8th Cir. 1983). The Army could also possibly avoid the third prong of the test by not making information about the discharge public. Nevertheless, the conservative approach would be to afford all officers facing a UOTH discharge an opportunity for a hearing, since receiving such a discharge could adversely affect their good standing in the community or their interest in being able to pursue a career elsewhere. *See Roth*, 408 U.S. at 573-74.

[116] *See supra* text accompanying note 109.

[117] *See* Orloff v. Willoughby, 345 U.S. 83, 93 (1953), where the Supreme Court noted that "judges are not given the task of running the Army." For other cases showing judicial deference to military policy decisions, see Gilligan v. Morgan, 413 U.S. 1 (1973); Arnheiter v. Chaffee, 435 F.2d 691 (9th Cir. 1970).

only misconduct and incompetence.[118] One suggestion would be to limit separation pay to only those non-probationary officers who have been the subject of a reduction in force or who have been twice non-selected for promotion.[119] All officers recommended for elimination under AR 635-100, chapter 5, could resign in lieu of elimination, but would receive no separation pay. Besides the obvious monetary savings, the above system would ensure that separation pay only goes to those officers who are truly being involuntarily separated from the service, despite having served honorably and to the best of their ability.

The advantages to the above system are obvious. Reducing the number of tenured officers means that many more cases could be handled under the expedited probationary officer procedure.[120] Furthermore, those officers entitled to full due process would still receive a fair, but simplified, due process hearing (that could be waived). They would also have the final decision in their case made at the local level by the GOSCA. The officer is not left languishing for months while awaiting the review of his case by HQDA, and the chain of command is not saddled for months with a substandard officer who may be adversely affecting unit morale and combat readiness. Of course, the disadvantage of the above proposal is that it is somewhat controversial and would require extensive changes to our officer elimination statutes and regulations. Getting Congress or DOD to make such changes is not likely to be fast or easy.

Conclusion

Our officer elimination regulations are poorly organized, poorly drafted, and archaic. As a result, the elimination system is misunderstood by commanders and judge advocates alike. The elimination process is also unnecessarily slow and inefficient, largely due to inordinate amounts of due process gratuitously incorporated into the system.

Judge advocates can play a significant role in improving our officer elimination system. First, they must familiarize themselves with the system and must be able to explain it to commanders. Second, they must be aware of problem areas in our present system and must devise ways to deal with these problems when they arise in the field. Finally, judge advocates should always strive to make our regulations better. This can be done by mailing in suggestions to the proponent and by proposing changes to individuals in a position to make policy.

Until judge advocates recognize the problems in the officer elimination system, develop innovative ways to resolve those problems, and actively press for much needed changes in the elimination regulations, we will continue to be plagued by a system in disrepair.

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[118] For example, under our present regulations, we give separation pay to officers whose conduct or performance of duty has been so unacceptable that their chain of command has had to initiate action to involuntarily remove them from the service. In some cases, the officer has even engaged in criminal misconduct that, for one reason or another, will not go to trial. Meanwhile, officers who have served honorably and performed well above the level of their peers, but who decide to voluntarily leave the service prior to being retirement eligible, receive absolutely nothing. In effect, we end up rewarding misconduct and incompetence, as long as it does not rise to the level where it warrants an Under Other Than Honorable (UOTH) discharge. *See* Dep't of Defense, Military Pay and Allowances Entitlements Manual, para. 40413a(12) (9 Mar. 1987) (C15, 1 Oct. 1989).

[119] Even in these cases, the chain of command should be allowed to recommend to the Secretary of the Army that no separation pay be given in special cases where it is not deserving. *Cf. id.* para. 40413a(9).

[120] *See* AR 635-100, § IX. Of course, these "probationary" officers still receive some due process (i.e., notice and an opportunity to submit written matters in their behalf). They merely have no right to present matters in person to a board of officers.

USAREUR Regulation 27-9, "Misconduct by Civilians"

Captain James Kevin Lovejoy
Defense Appellate Division, USALSA

"Major Monahan, this is Sergeant Thomas from the MP Station. We just picked up your son, Sam, shoplifting at the Shoppette. Could you or Mrs. Monahan come down to the station?"[1]

"In my office Sergeant Webster. I got another call from MPI about your wife. While we were in the field last week she seriously assaulted the wife of a man she was dancing with at the NCO club. The victim is still in

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[1] Although the names and situations portrayed herein are purely fictitious, similar incidents occur on a regular basis in USAREUR communities.

the hospital with internal bleeding. You know this is the fourth time she has hit the blotter."

"Hello judge, this is Colonel Thomas, the deputy community commander. I need some legal advice. We picked up Major Monahan's twelve-year-old kid shoplifting at the Shoppette. And remember Mrs. Webster? She got in another fight this past week. Can't we do something to her this time?"

Misconduct by civilians—a frustrating problem for commanders in United States Army, Europe (USAREUR). Civilian offenders cannot be prosecuted by the Army. What can be done to them? This article will explore and analyze that issue.

The Federal Republic of Germany, as the host nation, has exclusive jurisdiction to prosecute civilian offenders.[2] As a result, many commanders and law enforcement officials assigned to USAREUR wonder what can be done by the command in response to civilian misconduct. Incidents of shoplifting and assaults by civilians in the United States are generally handled by local juvenile or civilian police and judicial authorities. In USAREUR, however, these same offenses are not as easily processed.

For day-to-day minor acts of misconduct (traffic violations, juvenile delinquency, etc.), the inability to prosecute is not a significant problem. This is not the case, however, for repeat offenders and those who commit serious crimes. Community commanders often want to prosecute serious offenders, but they cannot. German authorities can prosecute, but generally are reluctant to do so.[3]

Although Mrs. Webster cannot be prosecuted for these offenses under United States law while she is overseas,[4] this does not mean that her offenses must go unpunished. In light of the historical reluctance of German authorities to involve themselves with incidents of civilian misconduct between Americans, USAREUR commanders are compelled to take the lead role in the investigation, adjudication, and punishment of civilian misconduct.

The specific purpose of this article is to explain USAREUR's mechanism for responding to civilian misconduct, be it shoplifting, spouse abuse, blackmarketing, or aggravated assault. This mechanism is found in USAREUR Regulation 27-9, Misconduct by Civilians.[5]

Assumptions

The Commander in Chief, USAREUR (CINC), is responsible for accomplishing the Army's mission in Europe. Civilians accompanying the force are authorized individual logistic support (ILS),[6] although this support is conditioned on their continued good behavior.[7] When civilians are disruptive and interfere with the USAREUR mission, access to ILS may be terminated.[8]

USAREUR community commanders are responsible for maintaining the general welfare, morale, safety, and good order and discipline of their communities. This was recognized by the United States Supreme Court in *United States v. Spock*,[9] where the Court noted that "[t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command."[10]

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[2] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter NATO SOFA], art. VII, para. 1b.

[3] The history of USAREUR reveals significant host nation reluctance to prosecute offenses solely involving American interests (i.e., those committed by American civilians against other Americans). "*Legalitaetsprinzip*" (principle of legality), contained in section 152(2) of the German Code of Criminal Procedure, mandates prosecution unless the offense is minor, the culpability is slight, or public interest does not warrant it.

[4] Although most federal criminal statutes do not extend overseas, certain statutes are extraterritorial (e.g., mail fraud, 18 U.S.C. § 1341 (1988), and bribery and graft, 18 U.S.C. § 201 (1988)) and may be prosecuted if the offender is returned to a U.S. district court. See USACIDC Pamphlet 195-8, Criminal Investigation, Common Violations of the United States Code in Economic Crime Investigations (15 Nov. 1983), for a compilation of U.S. Code provisions that are extraterritorial.

[5] U.S. Army Europe Regulation 27-9, Misconduct by Civilians (27 Oct. 1988) [hereinafter USAREUR Reg. 27- 9], replaced USAREUR Reg. 27-3, Misconduct by Civilians Eligible to Receive Individual Logistic Support (5 Jan. 1982) [hereinafter USAREUR Reg. 27-3]. USAREUR Reg. 27-3 was revised with the intent to provide USAREUR commanders a more streamlined process for handling incidents of civilian misconduct. The revision also provides specific appeal procedures for offenders and specifies who may serve as a Civilian Misconduct Action Authority.

[6] Individual Logistic Support includes exchange, commissary, morale, welfare, and recreation services and facilities, as well as a host of other services provided by USAREUR. USAREUR Reg. 600-700, Individual Logistic Support (17 Jan. 1985) [hereinafter USAREUR Reg. 600-700], contains a complete listing of individual logistic support authorized persons accompanying the force in USAREUR.

[7] The authority of USAREUR to provide ILS to members accompanying the force stems from articles 65, 66, and 67 of the Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Forces Stationed in the Federal Republic of Germany, August 3, 1959, 1 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 [hereinafter Supplementary Agreement].

[8] USAREUR Reg. 600-700, para. 9a(3).

[9] 424 U.S. 824 (1976). *See also* USAREUR Reg. 27-9, para. 4a; Dep't of Army, Pam. 27-21, Military Administrative Law, para. 2-14 (1 Oct. 1985).

[10] *Spock*, 424 U.S. at 840.

Along with the responsibilities placed upon a commander to provide for the concerns of the community, the commander is deemed to possess the "inherent authority" to take the actions necessary to protect and preserve the community welfare from persons who pose a threat to it.[11]

Under current international agreements, the Federal Republic of Germany has exclusive criminal jurisdiction over U.S. civilians accompanying the force.[12] German authorities often decline to exercise this authority for offenses committed by Americans against other Americans. Nevertheless, there are occasions when German authorities will pursue criminal action against American civilians.[13] In the event German authorities do exercise criminal jurisdiction, this does not prohibit U.S. authorities from taking separate administrative action against the U.S. citizen offender if the U.S. citizen has the "status" of accompanying the United States Forces.[14]

Responding to Reports of Civilian Misconduct

USAREUR Reg. 27-9 requires that USAREUR community commanders appoint a Civilian Misconduct Action Authority (CMAA) to investigate, adjudicate, and otherwise respond as needed to acts of civilian misconduct within the community.[15] In most USAREUR communities, the deputy community commander (DCC) or deputy subcommunity commander is appointed to perform the duties of CMAA.[16]

CMAA's are required to appoint an Assistant Civilian Misconduct Action Authority (ACMAA) to receive reports and maintain records concerning civilian misconduct and monitor the status of ongoing investigations. ACMAA's are also tasked with reporting certain types of misconduct to local judge advocates who, in turn, must notify host nation authorities.[17]

Once informed of misconduct, there are several courses of action from which the CMAA may choose. The CMAA may elect to take minor administrative action,[18] personally conduct or direct the ACMAA to conduct a preliminary inquiry, or close the case and take no action.[19] Minor administrative action is appropriate when all pertinent facts are established and undisputed and when the appropriate response is suitable and apparent. A preliminary inquiry is appropriate when the facts are unclear or the proper administrative response is not apparent. The appointment of an investigating officer, other than the ACMAA, may be advisable in serious or complex cases, or in other unique circumstances. In the shoplifting example involving twelve-year-old Sam Monahan, it would not be unusual for a CMAA to conduct a preliminary inquiry before deciding upon the appropriate action. A preliminary inquiry enables the CMAA to ascertain the facts and consult interested parties (witnesses, parents, school authorities, shoppette manager) about the alleged offense and, if confirmed, about the proper punishment.

Mrs. Webster's assault, on the other hand (whether or not prosecuted by German authorities), should probably be investigated by an investigating officer. Investigating officers appointed under the provisions of USAREUR Reg. 27-9 are not bound by the procedures of a formal AR 15-6 investigation, but may use the informal procedures, if desirable.[20] Pending the results of a preliminary inquiry or the findings and recommendations of an investigating officer,[21] the CMAA is authorized to temporarily suspend logistic support if deemed necessary to prevent further misconduct.[22] Permanent revocation of logistic support requires additional due process as discussed below.

Administrative Procedures

Once the preliminary inquiry or investigation is complete, the CMAA can close the case, take minor admin-

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[11] *Id. See also* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 893 (1961).

[12] *See supra* note 2 and accompanying text.

[13] Experience reveals that host nations are more likely to exercise their authority over those offenses involving a host nation victim or some other significant host nation interest. This may include soldiers who commit crimes that are not punishable under the Uniform Code of Military Justice (e.g., employing illegal aliens as nannies or polluting the environment).

[14] USAREUR Reg. 27-9, para. 5e. Although the host nation may have an interest in pursuing criminal sanctions against the offender, USAREUR has its own interest in taking action to ensure the offender does not further jeopardize the USAREUR mission.

[15] *Id.* para. 4b.

[16] *Id.* para. 4a(2).

[17] *Id.* paras. 6c. and 6d. *See also* USAREUR Regulation 550-56, Exercise of Jurisdiction by Federal Republic of Germany Courts and Authorities Over US Personnel (11 Oct. 1983).

[18] USAREUR Reg. 27-9, para. 10b. Minor administrative action includes oral counseling or a letter of warning. Parents must be provided a reasonable opportunity to be present for counseling involving minor children.

[19] *Id.* para. 7.

[20] *Id.* para. 9a.

[21] *Id.* para. 9d(2)(D). As in other informal investigations, the findings and recommendations of the investigating officer are not binding on the CMAA.

[22] *Id.* para. 7a; *see also* USAREUR Reg. 600-700, para. 9a(3).

istrative action, or initiate adverse administrative action.[23] Prior to taking any adverse administrative actions, however, CMAA's must provide offenders minimum due process (i.e., notice and an opportunity to respond). Notice to the respondent must include a statement of the intended administrative action, a summary of the facts, an opportunity to review any file that may exist,[24] and the right to respond orally or in writing within three work days.[25] Notice to the respondent need not be in writing, but oral notice should be confirmed by a memorandum for record. Respondents may request the presence of witnesses and another person to speak on their behalf. Parents and sponsors of family member offenders should be provided a reasonable opportunity to attend. Unless otherwise required by a specific Army regulation, the procedures by which respondents are provided an opportunity to respond are left to the discretion of the CMAA.[26] When determining the procedures for providing the respondent an opportunity to respond, CMAAs are encouraged to consult their local staff judge advocate. The seriousness of the offense, the gravity of the intended adverse action, and other Army regulations may affect the due process safeguards owed to the respondent (e.g., opportunity to call witnesses or to be represented by an attorney).

After duly considering any timely oral or written response, the CMAA will notify the offender (and the parents or sponsor) of the action the CMAA has decided to take. The notice will advise the offender of his or her opportunity to submit a written appeal to the appellate authority within seven calendar days.[27] Punishment may be suspended for a designated period of time or pending the outcome of an appeal. Appeals should be forwarded to the appellate authority through the CMAA for review and comment. Although not required by USAREUR Reg. 27-9, CMAA's are encouraged to have all appeals reviewed by a judge advocate.[28]

Selecting the Proper Adverse Administrative Action

Factors a CMAA should take into consideration when determining the appropriate administrative action include: the age and maturity of the offender; the offender's prior record; the seriousness of the misconduct; compensation to the victim; willingness to participate in counseling or community service; the relationship of the intended sanction to the misconduct;[29] and minimum procedures and punishments required by related Army regulations.[30]

Assume in Sam Monahan's case that this is his first incident of misconduct. After notifying Sam and his parents (or sponsor) of the intended action, considering any responses, and consulting others who know Sam (school authorities, Boy Scout troop leader, etc.), it would not be unusual for the CMAA to direct[31] that Sam provide a

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[23] For purposes of USAREUR Reg. 27-9, adverse administrative action is anything other than counseling or a letter of warning. *See supra* note 18. USAREUR Reg. 27-9, para. 12, provides a list of administrative actions available to the CMAA. The list includes: notifying hiring authorities; suspension of exchange, commissary, check cashing, ration card, and Class VI privileges; bars from entry; and early return from overseas. This list is not exclusive and does not prevent the CMAA from crafting some other administrative action deemed appropriate under the circumstances.

[24] USAREUR Reg. 27-9, para. 10c(3). When providing the respondent an opportunity to review the file, certain portions may be withheld for good cause under Army Reg. 340-17, Release of Information and Records from Army Files (1 Oct. 1982). CMAA's are encouraged to consult their local judge advocate prior to withholding such information. USAREUR Reg. 27-9, para. 10h.

[25] USAREUR Reg. 27-9, paras. 10b and 10c. Notice to the respondent and providing an opportunity to examine the file is not required for minor administrative action.

[26] *Id.* para. 5b.

[27] *Id.* para. 4a(5). The community commander normally serves as appellate authority for acts of misconduct occurring in his or her community. This authority may be delegated to a deputy community commander who does not serve as CMAA.

[28] *Id.* para. 10h.

[29] Normally, the sanction imposed should bear a rational relationship to the misconduct committed. Several Army regulations tie suspension or termination of a particular ILS privilege to abuse of the specific privilege. *See* Army Reg. 60-20, Army and Air Force Exchange Operating Policies, para. 2-15 (1 Aug. 1984) [hereinafter AR 60-20]; Army Reg. 30-19, Army Commissary Store Operating Policies, para. 4-11 (1 June 1980); Army Reg. 640-3, Identification Cards, Tags, and Badges, chap. 4 (17 Aug. 1984). Other regulations do not impose such restrictions. Morale, welfare, and recreation (MWR) activities may be suspended whenever the commander determines it to be in the best interest of the activity, the installation, or the Army. Army Reg. 215-1, Administration of Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities, para. 2-18f (20 Feb. 1984). Government quarters may be terminated when occupants are involved in misuse or illegal use of quarters, or other misconduct contrary to safety, health, or moral standards. Army Reg. 210-50, Family Housing Management, para. 3-26b (1 Feb. 1982).

[30] AR 60-20, para. 2-15d, requires offenders to be notified of the charges and given an opportunity to present contrary evidence. The same paragraph also requires a minimum six-month suspension of exchange privileges when an incident of shoplifting in the exchange is substantiated. Army Reg. 210-60, Control and Prevention of Abuse of Check-Cashing Privileges, para. 2-8 (15 June 1984), requires a one-year suspension of check-cashing privileges for persons who have twice uttered checks that were dishonored, but only after offenders have failed to redeem the check within the appropriate grace period or failed to offer proof of bank error.

[31] *See* USAREUR Reg. 27-9, para. 5b. Except when otherwise directed by Army regulation, the CMAA has ultimate discretion to determine the appropriate punishment for a particular act of misconduct.

certain number of hours of community service, in addition to the required six-month suspension of his exchange privileges.[32] Requiring ("requesting") Sam to perform forty hours of community service, as opposed to more severe actions (e.g., barring him from the local installation or directing his early return to the United States), is appropriate in light of Sam's age and maturity and the fact that this is his first offense.

The appropriate administrative sanctions for Mrs. Webster are much more severe in light of her age, the gravity of her offense (aggravated assault), and her record of misconduct. Because she was involved in a serious assault, the incident must be reported to German authorities.[33] If so inclined, the CMAA may formally request host nation prosecution of Mrs. Webster.[34] If the offense is alcohol related, Mrs. Webster's package store ("Class VI" store) privileges may be terminated.[35] She could be barred from the NCO club or the entire community,[36] provided she is not denied access to medical care.[37] The CMAA may also forward to the general court-martial convening authority a request for issuance of a USAREUR-wide bar.[38]

Bars to entry may have the incidental effect of terminating access to military facilities that have not been abused. As discussed above, some Army regulations require a nexus before an offense may justify termination of a privilege. It is the opinion of the author that the authority and responsibility of the commander to provide for the community's general welfare, morale, safety, and good order and discipline would withstand a challenge that the CMAA violated a regulation requiring a nexus between the privilege effectively terminated and the offense committed.[39] Provided the CMAA's action is supported by substantial evidence and the offender is afforded minimum due process, there is nothing to prohibit the CMAA from issuing a bar letter that has the incidental effect of denying the offender access to certain privileges that have not been abused. CMAA's can avoid the potential problem by issuing a tailored bar letter that provides offenders limited access to certain facilities. This is particularly advisable when dealing with access to medical care.

If the above measures do not provide an effective response to Mrs. Webster's misconduct, the CMAA may initiate action requesting the early return of Mrs. Webster to the United States. Advance return of family members is authorized whenever it is determined to be in the best interests of the member and the government.[40] It should be noted, however, that felony offenders like Mrs. Webster may not be returned to the United States at government expense until the host nation has been notified and expressed no objection to departure.[41] The ultimate adverse administrative action in the CMAA's arsenal is termination of command sponsorship and permanent revocation of all individual logistic support (except medical care). This punishment should not be imposed until an offender has been offered and has refused advance return to the United States.

Disruptive civilians are not the only persons who may be affected by the actions of the CMAA. Sponsors unable to control the actions of their family members may find their privilege of residing in government quarters termi-

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[32] Participation in a community supervision program must be voluntary. *See* USAREUR Reg. 27-9, para. 13. Nevertheless, reluctance of an offender to participate in a community supervision program may lead to more severe administrative actions, such as bars to entry or, in the instant case, perhaps a one-year suspension of exchange privileges, theater privileges, and all MWR activities.

[33] All felonies and attempted felonies must be reported to German authorities. *See supra* note 17 and accompanying text.

[34] USAREUR Reg. 27-9, para. 5d. Procedures for requesting host nation prosecution are set forth in USAREUR Reg. 27-9, Appendix B. The host nation has no obligation to honor such requests. Nevertheless, submission of a request may prove to be a means of persuading a troublesome offender to modify disruptive behavior. It may also provide support for any subsequent requests to have the host nation remove the offender from the host nation. *See infra* note 43 and accompanying text.

[35] USAREUR Reg. 230-70, USAREUR Class VI Activities and Ration Policy, para. 19 (30 Apr. 1976) (C5, 8 Sept. 1981), authorizes commanders to withdraw Class VI privileges for any alcohol abuse that results in serious misconduct whether or not the abuse involved alcoholic beverages purchased through the Class VI system.

[36] A community commander has inherent authority to bar persons from areas under his or her control. *See Cafeteria & Restaurant Workers Union*, 367 U.S. at 886. *See also supra* notes 10-11 and accompanying text. In USAREUR, the community commander may delegate this authority to the local CMAA. USAREUR Reg. 27-9, para. 12e(1).

[37] Access to medical care for dependents of military sponsors is provided by statute, 10 U.S.C. § 1076 (1988), and can rarely be terminated. Situations involving serious or repeated abuse of medical facilities may justify suspension or revocation of access to medical care.

[38] CINC USAREUR possesses exclusive authority to issue USAREUR-wide bars to entry, as he alone controls all USAREUR installations. This authority is delegated to USAREUR general court-martial convening authorities in USAREUR Reg. 27-9, para. 12e(2).

[39] In the unlikely event that the actions of a CMAA were challenged in federal court, the court would most likely apply an "arbitrary and capricious" standard of review. *See* McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas — Still With Us*, 117 Mil. L. Rev. 153, 209-10 (1987).

[40] *See* Joint Federal Travel Regulation, para. U5240D (1 Jan. 1987).

[41] USAREUR Reg. 27-9, para. 12f(3).

nated by the CMAA.[42] The CMAA may also initiate action to have the sponsor's overseas tour curtailed.[43] When all else has failed and the CMAA is unable to rid the community of a disruptive civilian, the CMAA may ask host nation authorities to involuntarily remove the offender from the host country.[44]

Coordination Between the CMAA, Civilian Employees, Supervisors, and DODDS

The provisions of USAREUR Reg. 27-9 authorizing the CMAA to impose administrative sanctions against civilians committing acts of misconduct do not necessarily replace the authority of supervisors to take adverse personnel action against civilian employees. Federal civilian personnel regulations provide supervisors with independent authority to take adverse actions against civilian employees where permissible and appropriate under the circumstances.[45] CMAA's nevertheless are encouraged to coordinate their investigations and to inform local civilian personnel offices of misconduct or sanctions that may affect the hiring or continued employment of offenders.[46] CMAA's should likewise coordinate actions involving juvenile misconduct with Department of Defense Dependent Schools (DODDS) authorities. Although DODDS authorities are free to take separate action in response to disciplinary problems arising at school and school-related activities,[47] DODDS officials are required to notify local military authorities of incidents leading to the suspension or expulsion of a student from school and all other criminal offenses occurring in school.[48] CMAA's, in turn, should advise DODDS administrators of misconduct occurring outside the school that may require disciplinary action by DODDS.

Conclusion

USAREUR Reg. 27-9 was published with the intent to provide USAREUR commanders the flexibility, discretion, and procedures they need to effectively respond to acts of civilian misconduct. USAREUR Reg. 27-9 protects the due process interests of civilians accompanying the military force without jeopardizing the needs of the command to accomplish its mission free from the interference of disruptive civilians. The bottom line is that civilians accompanying the force overseas are allowed to remain there on condition of good behavior. When civilians fail to live up to their end of the agreement, USAREUR Reg. 27-9 provides USAREUR CMAA's a broad arsenal of adverse administrative sanctions to utilize in response to their misconduct.

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[42] *Id.* para. 12d(6). Termination of government quarters may result from misconduct that did not occur in or involve the abuse of government quarters. *See supra* note 29.

[43] Army Reg. 614-30, Overseas Service, para. 8-2a (1 Apr. 1988), provides that: "Overseas MACOM commanders may, at any time, curtail the tour of a soldier who has or may discredit or embarrass the United States, or jeopardize the commander's mission."

[44] USAREUR Reg. 27-9, para. 12h. *See also* NATO SOFA, art. III; Supplementary Agreement, art. 8. Requests for removal from the host nation must include a detailed statement of the facts justifying removal. To have any chance of approval, the request should include previous requests for host nation prosecution. Review of recent HQ, USAREUR, records reveals no case in which the host nation has favorably responded to a U.S. Forces request to have a disruptive civilian removed. Each host nation denial was based on the absence of prior requests for host nation prosecution. *See supra* note 34, addressing requests for host nation prosecution.

[45] USAREUR Reg. 27-9, para. 14a; *see also* Army Reg. 690-700, Personnel Relations and Services (15 Nov. 1981).

[46] USAREUR Reg. 27-9, para. 12c.

[47] *Id.* para. 14b. *See also* Dep't of Defense Manual 13426 M-1, Administrative and Logistic Responsibilities for DOD Dependent Schools (25 Oct. 1978).

[48] USAREUR Reg. 27-9, para. 4e.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Resistance as a Component of Force in Rape: Clear Guidance From the Army Court of Military Review

From a defense perspective, two aspects of rape prosecutions are ripe for litigation: force and nonconsent.[1] On an ethical level, however, "the law of rape inevitably treads on the explosive ground of sex roles, of male

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[1] The elements of rape are:

(1) That the accused committed an act of sexual intercourse with a certain female;

(2) That the female was not the accused's wife; and

(3) That the act of sexual intercourse was done by force and without her consent.

Manual for Courts-Martial, United States, 1984, Part IV, para. 45b(1).

aggression and female passivity, of our understandings of sexuality."[2] Judge advocates should take interest in defining the mores involved in rape cases as they apply to current circumstances in military life where the force structure includes female soldiers.[3]

The Army Court of Military Review recently rendered an opinion giving a thorough discussion and interpretation of the requirement of force in rape prosecutions. In *United States v. Bonano-Torres*[4] the Army court found force to be lacking in the alleged rape of an enlisted woman. The accused was a staff sergeant and the victim was a specialist. Both were assigned to an Army finance office in the Federal Republic of Germany. In performing their duties, they had traveled on an overnight pay mission. During the assignment, they went to an expensive restaurant where the accused paid for dinner. Subsequently, they went dancing and the accused picked her a rose and carried her up the stairs to her room. In a statement provided by the accused, he indicated that they also kissed as they returned to her room. There is no dispute that both the victim and the accused were drunk. During the course of the night, the accused made several advances upon the victim. She responded by pushing his hands away and turning her head. She also stated that she did not want to have intercourse because the accused was married and had children. The victim admitted that she was drunk and confused, and that she passed in and out of consciousness. She testified at trial that she allowed the accused to penetrate her because she wanted to sleep and knew that the accused would no longer bother her once he was done. After discussing the events with her friends, her boyfriend, and several female noncommissioned officers, she reported that she thought she may have been raped.[5]

The Army court stated that mere nonconsent is not sufficient to constitute rape. Instead, proof of compulsion is a necessary element that "contemplates an application of force to overcome the victim's will and capacity to resist."[6] In evaluating whether force is present, the Army court indicated that "proof of resistance" is highly probative of force.[7] The Army court, however, did not mechanically require some level of resistance in all cases. Instead, the Army court simply required the finder of fact to consider the physical capacity of the victim when deciding whether resistance was reasonable. The formula provided by the Army court thereby incorporates the concept of constructive force as well as recognizing that, in some situations, resistance is futile and therefore unnecessary.

The ultimate holding of the Army court in *Bonano-Torres* was that "force" was not present. In other words, under the circumstances, the victim was required to offer more resistance than she did.[8]

An interesting facet of the conclusion of the Army court was that, under the circumstances, the disparity in rank between the accused and the victim was simply not outcome-determinative. Although the accused did manifest an aggressive attitude towards the victim, the more relevant inquiry was direct force/resistance and whether the accused's actions were calculated to overcome the will of the victim to resist.[9]

In rape cases, such an inquiry is probably more fair to the victim because the focus is then shifted toward the conduct of the accused rather than the actions of the victim. Such a perspective tends to mitigate the effect of placing the victim rather than the accused "on trial."[10] Instead of relying upon what seems to be the current rape

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[2]Estrich, *Rape*, 95 Yale L.J. 1087, 1091 (1986). More often than not, in rape prosecutions, it is the victim who is on trial as well as the accused. However, the simple fact that military law requires force in addition to nonconsent means that a woman is restricted in her ability to express her own autonomy. Thus, successful rape prosecutions must always explore the intentions of the woman as well as the intentions of the man. Such a shift in the focus of responsibility from the accused to victim rarely occurs in criminal law. As such, a return to a more traditional criminal law approach instead of the current doctrinal approach to rape is presented in this Note.

[3]The military appellate courts are continually struggling to define the limits of these relationships. In the military environment, normative assumptions with respect to the psychology of dominance and control cannot readily be applied. *See* United States v. Bradley, 28 M.J. 197, 200 (C.M.A. 1989) (the wife of a soldier in basic training raped by the soldier's platoon sergeant whereby explicit threats or force were not necessary); United States v. Hicks, 24 M.J. 3 (C.M.A. 1987) (the girlfriend of a soldier raped by the soldier's section leader).

[4]29 M.J. 845 (A.C.M.R. 1989), *cert. filed*, 29 M.J. 463 (C.M.A. 1989).

[5]29 M.J. at 847-49.

[6]29 M.J. at 850 (citing Coker v. Georgia, 433 U.S. 584, 587 (1977)).

[7]*Id.* Resistance is also relevant to assist in finding nonconsent or mistake of fact. Defense counsel should be careful in framing their arguments, as the level of resistance necessary may be different depending on what facts, elements of proof, or defenses are at issue.

[8]29 M.J. at 851.

[9]In effect, understanding the capacity of the woman to resist necessarily includes an evaluation of whether the acts of the accused were intended to overcome that capacity to resist.

[10]Estrich, *supra* note 2, at 1117-18.

doctrinal analysis, which focuses on the capacity of the victim to resist, it is possible to apply the more traditional criminal model, which examines the conduct of the accused. Using the facts in *Bonano-Torres*, the test would be whether the acts of the accused were intended to overcome the capacity of the victim to resist. Under this analysis, the accused in *Bonano-Torres* simply did not attempt to exert enough dominance or control over the victim. The accused used neither rank nor his authority to effect control. He was in her room at her invitation. He never attempted to mislead the victim or signal any threat or coercion. Although she pushed him aside, he never exerted an amount of force that was calculated to overcome her capacity to resist at any point. As the Army court made clear, the actions of the accused may have been sufficient to charge and support findings of guilty to indecent assault. Nevertheless, under the circumstances, the accused did not *rape* the victim. Captain Ralph L. Gonzalez.

Uniform Code of Military Justice Article 38(c): Trial Defense Counsel's Under Utilized Tool of Appellate Advocacy

Defense counsel occasionally feel the frustration of raising what they believe to be meritorious issues at trial only to find that those matters were not further pursued on appeal. Trial defense counsel have a means of ensuring that this does not happen. The Uniform Code of Military Justice[11] provides a method for defense counsel to assert these matters on appeal. Article 38 provides:

> (c) In any court-martial proceeding resulting in a conviction, the defense counsel—
>
> (1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate).[12]

This provision has been recognized as permitting trial defense counsel to interject themselves into the appellate process by filing briefs of legal issues to be raised[13] and by challenging the accuracy of, and requesting changes to, the records of trial.[14] Thus, UCMJ art. 38(c) provides a convenient means for trial defense counsel to file an appellate brief within the record. The article is further supplemented by the usual post-trial submission methods provided for in R.C.M. 1105 and 1106.[15]

Despite its obvious usefulness to defense counsel, subsection (c)(1) of the article is rarely invoked.[16] Yet, interestingly, a predecessor version of this provision appeared in the proposed Articles for the Government of the Navy and would have required defense counsel in every case to submit either a brief or a statement explaining why no brief was necessary. Nevertheless, UCMJ art. 38(c) was made permissive because it was felt that "if the latter alternative were chosen it might actually prejudice the accused on review."[17]

Article 38(c), UCMJ, contemplates the filing of a brief addressing legal issues. As the Navy-Marine Corps Court of Military Review has noted, "brief" is a term of art and connotes more than a mere statement of the general nature of an issue.[18] It suggests "the incisive and exhaustive development of an issue."[19] Hence, simply noting an error on an appellate rights form is not sufficient to call the matter to the attention of the reviewing authorities.[20] Neither will a cursory assertion of legal error under R.C.M. 1105(b) (1).

A UCMJ art. 38(c) brief provides the best vehicle for asserting what the trial defense counsel believes to be meritorious issues.[21] The advantage of filing such a

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[11] 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

[12] UCMJ art. 38.

[13] For examples of ways in which trial defense counsel's brief may be incorporated into the appellate pleadings, see United States v. Hillman, 18 M.J. 638 (N.M.C.M.R. 1984), and United States v. Lutz, 18 M.J. 763 (C.G.C.M.R. 1984).

[14] *See* United States v. Luedtke, 19 M.J. 548, 553 (N.M.C.M.R. 1984).

[15] Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 1105 and 1106 [hereinafter MCM, 1984, and R.C.M., respectively]. *See* United States v. Skaar, 20 M.J. 836, 841 n.3 (N.M.C.M.R. 1985).

[16] *See, e.g.*, United States v. Fagnan, 30 C.M.R. 192 (C.M.A. 1961) (court noted that briefs under UCMJ art. 38(c) are rarely filed); United States v. Skaar, 20 M.J. at 838 (noting UCMJ art. 38(c) is "little used").

[17] United States Army Legal Services Agency, Index and Legislative History: Uniform Code of Military Justice 1950, at 490. *Cf.* Anders v. California, 386 U.S. 738 (1967) (no merit letter filed by appellate counsel); United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[18] *Luedtke*, 19 M.J. at 552.

[19] *Id.*

[20] *Id.* at 552-53.

[21] "Scant purpose is served cluttering up a [response to the staff judge advocate's review] with the merits of trial errors. If trial defense counsel deems it appropriate to address trial errors ... the appropriate vehicle is a post-trial brief." United States v. Schrock, 11 M.J. 797, 799 n.1 (A.F.C.M.R. 1981) (citation omitted).

detailed brief, from the trial defense counsel's perspective, is obvious: it "forc[es] the reviewer to meet head-on any errors that defense counsel perceives" and "puts the Government on the defensive."[22] By filing such a brief, trial defense counsel can ensure that those matters that in counsel's judgement are meritorious will be considered on appeal. For example, in *United States v. Johnson*[23] the trial defense counsel submitted what the court termed an "excellent" UCMJ art. 38(c) brief alleging that the military judge erred by refusing to instruct on the defense of entrapment.[24] The Air Force Court of Military Review agreed and set aside the findings and sentence.[25] Trial defense counsel who feel strongly about the presentation of issues on appeal should consider including their own "excellent" UCMJ art. 38(c) briefs on behalf of their clients. Captain Timothy P. Riley.

[22] United States v. Babcock, 14 M.J. 34, 39 n.2 (C.M.A. 1982) (Fletcher, J., concurring); *see* United States v. Tallaksen, 9 M.J. 877, 880 (N.C.M.R. 1980) (reviewing authorities would be well advised to note for the record their consideration of UCMJ art. 38(c) matters).

[23] 17 M.J. 1056 (A.F.C.M.R. 1983).

[24] 17 M.J. at 1057.

[25] 17 M.J. at 1058.

Trial Defense Service Note

Avoiding Conflicts of Interest in Trial Defense Practice

Captain Nancy A. Higgins
Nuernberg Field Office, USATDS

Introduction

Under the Rules of Professional Conduct for Lawyers,[1] regional defense counsel and senior defense counsel are "supervisory lawyers."[2] The Rules specifically define the duties of "supervisory lawyers" and "lawyers,"[3] and require compliance by all Army attorneys.[4] "Supervisory lawyers" must make "reasonable efforts" to ensure that their subordinates follow the Rules[5] and are responsible for their subordinates' violations if they: 1) knowingly ratify conduct that violates the rules; 2) knowingly fail to mitigate or avoid conduct that violates the rules; or 3) knowingly fail to take corrective action when a violation of the rules has occurred.[6]

This article will focus on the responsibilities of regional and senior defense counsel in the United States Army Trial Defense Service (hereinafter USATDS) under the Rules and more narrowly on the provisions governing conflicts of interest.

Conflicts of Interest

Regional and senior defense counsel must ensure that their subordinates comply with Rule 1.7, which governs representation of clients with conflicting interests.[7] Rule 1.7 provides that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse

[1] Dep't of Army, Pam 27-6, Legal Services: Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter R.P.C.].

[2] *See* R.P.C., "Definitions."

[3] *Id.*

[4] Id., "Scope."

[5] Id., Rule 5.1 (a).

[6] Id., Rule 5.1 (c).

[7] Id., Rules 1.7 and 5.1.

to another client."[8] Supervisors should not knowingly assign to subordinates cases or duties that will give rise to impermissible conflicts of interest,[9] and defense counsel should not undertake the representation of a new client if a conflict in violation of the Rules exists.[10] Each client is entitled to an attorney free of conflicts who can work loyally and zealously to advance that client's interests.[11]

In a trial by court-martial, the accused has the right to be represented by a detailed defense counsel, a "military counsel of his own selection if that counsel is reasonably available," or by civilian counsel retained at his own expense.[12] Senior defense counsel detail trial defense counsel to particular cases.[13] The USATDS standing operating procedures do not specify a particular system for detailing counsel.[14] Individual supervisors have broad discretion in assigning cases and are responsible for recognizing possible conflicts of interest and taking appropriate steps to avoid them or the appropriate remedial measures when a conflict occurs.

Several different conflicts of interest may require disqualification of counsel. They include possible conflicts between duties owed to a current client and a former client,[15] conflicts between two current clients,[16] situations creating an appearance of impropriety,[17] or when counsel are pending reassignment from USATDS or separation from the U.S. Army.[18] For USATDS supervisors possible conflicts generally arise in the following five recurring situations: 1) counsel newly assigned to USATDS who have prosecuted cases or represented clients in another capacity in the same jurisdiction; 2) defense counsel who must safeguard privileged relationships with current or former clients; 3) counsel who are separating from USATDS or the Army; 4) counsel who are married or maintain close personal relationships with other attorneys or members of the military service; and 5) counsel who disclose confidential information while discussing their cases with professional colleagues.

This article examines each of these recurring situations in greater detail and suggests practical means to minimize conflicts.

Former Clients

Rule 1.9 prohibits an attorney who has previously represented a client in a case that involved "the same or a substantially related matter" from representing a new client if the new client's interests are "materially adverse" to the interests of the former client.[19]

An attorney no longer represents a client's interests when the attorney is dismissed by that client;[20] when the attorney properly withdraws from representation of the client;[21] when the lawyer leaves military service;[22] when the matter in which the lawyer represented the client is

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[8] *Id.*, Rule 1.7(a) specifies that:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
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> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[9] *Id.*, and Rule 5.1.

[10] *Id.*, Rule 1.16(a)(1).

[11] *Id.*, Comment to Rule 1.7.

[12] Uniform Code of Military Justice art. 38, 10 U.S.C. § 838 (1988) [hereinafter UCMJ].

[13] UCMJ art. 27(a)(1); Army Reg. 27-10, Legal Services — Military Justice, para. 6-9 (16 Jan. 1989) [hereinafter AR 27-10].

[14] U.S. Army Trial Defense Service Standing Operating Procedures, para. 3-7 (1 Oct. 1985).

[15] R.P.C., Rule 1.9.

[16] *Id.*, Rule 1.7.

[17] *Id.*

[18] *Id.*, Comment to Rule 1.7.

[19] *Id.*, Rule 1.9(a).

[20] *Id.*, Rule 1.16(a)(3).

[21] *Id.*, Comment to Rule 1.16.

[22] United States v. Polk, 27 M.J. 812 (A.C.M.R. 1988).

concluded;[23] or when the relationship is severed for other "good cause."[24] Good cause is not merely for the convenience of the Army.[25] Severance of the relationship converts the client's status to that of a former client.

The purpose of Rule 1.9 is to preserve "secrets and confidences communicated to the lawyer by the client."[26] A secondary purpose is to foster loyalty and commitment to the client.[27] That commitment is seriously jeopardized if attorneys switch sides in a substantially related matter.[28] Adverse representation in related cases endangers both the fact and appearance of total commitment.[29]

A newly assigned USATDS attorney should avoid discussing with other defense counsel information obtained from former clients with whom the lawyer developed an attorney-client relationship while serving in other sections of a legal office. Former clients include the U.S. Army as well as individuals.[30] If an attorney reveals confidential information about former clients to other counsel who may use it to the former client's detriment, the disclosure may result in a ban on all attorneys in the new office from representing clients in cases involving possible adverse use of that information.[31] When a defense counsel is assigned to USATDS from another duty position in the same jurisdiction, supervisory attorneys must take affirmative steps to ensure that the counsel does not participate in any matters affecting his former client(s).

To safeguard duties owed former clients and avoid conflicts of interest, military law prohibits the following conduct: 1) former defense counsel prosecuting former clients;[32] 2) former legal assistance officers and defense counsel cross-examining former clients, if their knowledge of privileged information obtained during the attorney-client relationship would taint their subsequent cross-examination;[33] 3) former trial counsel representing soldiers in cases in which they previously represented the government.[34]

Military law also specifies that anyone who has acted as "investigating officer, military judge or court member" in a case may not act as a trial counsel, assistant trial counsel, or as a defense counsel or assistant defense counsel, unless the accused makes an express request.[35] Furthermore, any person who has "acted for the prosecution" or "acted for the defense" may not later switch sides in the same case.[36] A defense counsel is not disqualified, however, if the attorney merely performed the ministerial act of serving charges on the accused.[37]

Defense counsel face a dilemma when questioning former clients on the witness stand.[38] While counsel must zealously represent their current clients, they are prohibited from using confidential information obtained during the previous relationship to enhance the effectiveness of their cross-examination of their former client in a subsequent proceeding. The Second Circuit Court of Appeals noted that

> [t]here is in theory no vice in the proposed questioning of a former client that springs from sources independent of the client. But, as a practical matter, when sources other than the public record are cited, they are substantially more difficult to verify—especially where, as here, counsel may well have received confidential information from the witness

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[23] United States v. Williams, 27 M.J. 758 (A.F.C.M.R. 1988).

[24] United States v. Iverson, 5 M.J. 440, 442 (C.M.A. 1978). A change in assigned duties does not constitute "good cause."

[25] *Id.*

[26] Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980).

[27] *Id.*

[28] *Id.*

[29] *Id.* at 998-99.

[30] R.P.C., Rule 1.13.

[31] *See* United States v. Stubbs, 23 M.J. 188 (C.M.A. 1987); United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981).

[32] *See generally* United States v. Smith, 26 M.J. 152 (C.M.A. 1988); United States v. Stubbs, 23 M.J. 188 (C.M.A. 1987); United States v. Sulin, 44 C.M.R. 62 (A.F.C.M.R. 1971).

[33] *See* United States v. Fowler, 6 M.J. 501 (A.F.C.M.R. 1978); United States v. Diaz, 9 M.J. 691 (N.C.M.R. 1980).

[34] UCMJ art. 27.

[35] UCMJ art. 27(a)(2).

[36] *Id.* This disqualification may be waived by the accused. United States v. Sparks, 29 M.J. 52 (C.M.A. 1989).

[37] United States v. Robertson, 35 C.M.R. 554 (A.C.M.R. 1965).

[38] Lowenthal, *Successive Representation by Criminal Lawyers*, 93 Yale L. J. 1-64 (1983).

> on a wide variety of matters over a long period of time—and the court's ability to protect the witness' privilege is proportionately weakened.[39]

When the possibility exists that a defense counsel could exploit a prior confidential relationship with a former client who is now a witness, the attorney should withdraw. If that is impossible, another remedy is to have another attorney to conduct the examination.[40]

Current Clients and Concurrent Representation

Clients generally are permitted to obtain assistance from counsel of their choice, but this right is not absolute. It is limited when conflicts of interest are present or may arise in the future.[41] Before a defense counsel may represent parties with potentially conflicting interests, the attorney must perform a balancing test. Factors to be considered include: 1) the nature of the case; 2) the type of information the counsel will receive as a result of the representation; and 3) whether the client will be disadvantaged by the representation.[42]

In *Wheat v. United States* the U.S. Supreme Court stated that an institutional interest exists in rendering just verdicts and that this interest "may be jeopardized by unregulated multiple representation."[43] The Supreme Court recognized "a presumption in favor of a petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict, but by a showing of a serious potential for conflict."[44]

To establish an "actual conflict" or "serious potential for conflict,"[45] a direct link must exist between clients represented by the same attorney. One example of such linkage is representation of a client who may provide immunized testimony against another client.[46] One attorney could not effectively represent the interests of both clients in such a situation. Similarly, a single attorney cannot simultaneously represent two clients with mutually antagonistic defenses.[47] Two principal dangers arise from concurrent representation of clients with adverse interests: 1) the representation may have an adverse impact on the lawyer's exercise of independent professional judgment; and 2) such representation dilutes attorney loyalty and endangers the principle of client confidentiality.[48]

To minimize these dangers, concurrent representation, even if requested by the clients involved, is permissible only when the lawyer believes that his or her overlapping relationships with such clients will not adversely affect the representation and only after the attorney concerned has performed the balancing test described above. Although the law favors individual selection of counsel, simultaneous representation of clients having adverse interests is universally condemned and considered an undesirable practice, even with of the consent of the individuals involved.[49] Army Regulation 27-10 mandates written consent and prior approval by the attorney's supervisor before one attorney may represent co-defendants.[50]

Appearance of Impropriety

Certain close personal relationships between an attorney and persons other than present or former clients may also create the appearance of impropriety or conflicts of interest. These fact patterns may result in an appearance that the attorney's loyalties are divided as a result of perceived conflicts with "the lawyer's own (personal) interests."[51] Examples of such relationships

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[39] United States v. James, 708 F.2d 39, 45 (2d Cir. 1983).

[40] *Id.*

[41] *See* United States v. Breese, 11 M.J. 17 (C.M.A. 1981).

[42] Unified Sewerage Agency Etc. v. Jelco, Inc., 646 F.2d 1339, 1350 (9th Cir. 1981).

[43] Wheat v. United States, 100 L.Ed.2d 140, 149 (1988).

[44] *Id.* at 152.

[45] *Id.*

[46] *In re* Grand Jury Proceedings, 859 F.2d 1021, 1026 (1st Cir. 1988); United States v. Newak, 24 M.J. 238 (C.M.A. 1987).

[47] Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984).

[48] Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 Texas L. Rev. 211, 225-26 (1982).

[49] O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification*, 48 Geo. Wash. L. Rev. 693, 700 (1980).

[50] AR 27-10, app. C, para. C-2.

[51] R.P.C., Comment to Rule 1.7.

include possible conflicts between the professional responsibilities of attorneys who are married to other practicing attorneys or to unit commanders. An appearance of impropriety may also arise when an attorney is reassigned from the prosecution to the defense or vice versa within the same jurisdiction. Military commands are often small communities in which clients readily observe and question relationships between members of the same office, supporting staff, unit commanders, and others. A defense counsel married to a commander clearly should avoid forming an attorney-client relationship with any soldiers assigned to the spouse's unit. Clients may reasonably perceive that such close personal ties undermine the zealous representation which they expect from assigned counsel.

Courts are reluctant to disqualify counsel based solely on the appearance of impropriety in representation.[52] As a general rule, they will not deem an appearance of impropriety sufficient to disqualify an attorney absent a finding of actual impropriety based on evidence.[53] In *United States v. Washington* the Ninth Circuit Court of Appeals provided the following dicta on this issue:

> We have grave doubts whether an appearance of impropriety would ever create a sufficiently serious threat to public confidence in the integrity of the judicial process to justify overriding Sixth Amendment rights. It is easy to express vague concerns about public confidence in the integrity of the judicial process. It is quite a different matter to demonstrate that public confidence will in fact be undermined if criminal defendants are permitted to retain lawyers who worked for the government in the field of law implicated by an indictment.[54]

Counsel Leaving USATDS

Conflicts may also arise when a defense counsel is pending a permanent change of station (PCS) move or separation from military service.[55] Tensions may develop between the lawyer's personal concerns and his official duties. Pressures associated with outprocessing and other preparations for a major move or the search for civilian employment may result in declining enthusiasm and interest in case investigation, preparation, and presentation. Supervisors must closely monitor the conduct of counsel during these stressful transition periods. At least ninety days prior to the anticipated departure date, they should direct the subordinate concerned to ensure that all his or her clients are fully aware of the impending PCS move or separation from the service. Counsel completing active service must advise their clients that they will not be available to represent them after separation and provide guidance on obtaining substitute military counsel if the case will not be finished prior to their departure. Rule 1.2(c) specifically authorizes limitations on the scope of representation under these circumstances.[56] Whenever possible, the counsel concerned should decline to represent a client if the case or proceeding clearly will not be completed within the time limitations imposed by the attorney's departure. Supervisory attorneys can minimize the risk of conflicts with personal interests by planning early for the transfer of case responsibilities.

The length of post-trial processing times in many jurisdictions also generates special concerns for completion of defense post-trial responsibilities prior to counsel's departure. Supervisors should appoint assistant defense counsel for all cases in which post-trial processing will not be completed prior to the scheduled date. The assistant defense counsel must be fully familiar with all issues which may need to be raised in the post-trial submission. If the primary counsel separates from the service before completion of post-trial actions and an assistant was not previously appointed, substitution of counsel may be done only with the client's consent,[57] which preferably should be obtained in writing. The newly designated lawyer must then form an attorney-client relationship with the soldier concerned.

Counsel Discussing Cases with Colleagues

Attorneys frequently discuss current and past cases with their professional colleagues. Personnel serving in the same office must scrupulously avoid breaches of client confidences during such discussions. If confidential information is revealed to other attorneys under such circumstances, disqualification of the entire office may result. *United States v. Stubbs*[58] illustrates this danger. A defense counsel was transferred from USATDS to the trial counsel's office responsible for prosecuting one of the counsel's former clients. The defense made a motion

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[52] Board of Education of New York City v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979); Sierra Vista Hospital, Inc. v. United States, 639 F.2d 749, 754 (Cl. Ct. 1981) (former government attorney in Medicare fraud case later participated as a defense counsel).

[53] Note, *Appearance of Impropriety as the Sole Ground for Disqualification*, 31 Miami L. Rev. 1516, 1523 (1976).

[54] United States v. Washington, 797 F.2d 1461, 1466 (9th Cir. 1986).

[55] R.P.C., Comment to Rule 1.7.

[56] *Id.*, Rule 1.2(c).

[57] *Polk*, 27 M.J. at 812.

[58] *Stubbs*, 23 M.J. at 188.

to disqualify all members of the trial counsel's office since they had close contact with the accused's former counsel.[59] The trial judge denied the motion upon a showing that the former defense counsel did not disclose to other government lawyers any confidential information relating to the former client. The opinion clearly implied, however, that disqualification would have been required if confidential information had been disclosed.[60]

Another troublesome area involves disclosure of confidential information by one attorney seeking advice from another on the proper strategy to employ in a particular case. In this scenario, the attorney providing advice will be unable to represent any client whose interests are adverse to the first attorney's client.[61] Although the second attorney has not formed an attorney-client relationship with the first attorney's client, the disclosure nevertheless creates a conflict of interest. Significantly, the prohibitions in Rule 1.6 may be applicable if confidential information is revealed and the attorney-client privilege violated without the client's knowledge and consent.[62] Such conduct may disqualify an entire office or make it impossible for attorneys within an office to continue representation of co-accused or other parties with adverse interests.

Preventive Measures and Remedies

Regional and senior defense counsel must continually train their subordinates on the importance of recognizing possible conflicts of interest under the Rules and protecting client confidences. They must also emphasize the necessity for safeguarding privileged information to their legal specialists, civilian paralegals, secretaries, and student interns.[63]

Supervisors must encourage defense counsel to carefully screen new clients to ensure early detection of possible conflicts. If no attorney-client relationship exists and the initial counsel detects a possible conflict with current or former clients, the appropriate remedy is to decline representation and refer the soldier to another attorney. The situation is more complex, however, if the attorney undertakes the representation and later determines that an impermissible conflict may prevent his continued involvement in the case. Three possible solutions are available in this situation: 1) the attorney may be forced to withdraw from the case;[64] 2) the attorney "may limit the objectives of the representation if the client consents after consultation";[65] or 3) the attorney may obtain the client's consent to continued representation if such representation is legally permissible.[66]

Supervisors should ensure that a conflict screening system is part of their standing operating procedures. One commentator has observed:

> A firm should not wait for a question involving an actual client or matter to arise before it discusses potential conflicts issues. Rather, it should evaluate in advance the propriety of different screening techniques and reach a conclusion as to the circumstances in which screening can properly be used.[67]

At a minimum, a mechanism must exist for gathering new client information, and centralized client data files should be updated on a regular basis. Information about new clients must be evaluated using clearly defined procedures so that possible conflicts are detected early.[68] By ensuring lists and files are carefully cross-checked before case assignment or initial attorney interviews, supervisors can avoid readily apparent conflict situations, such as cases involving co-accused.

Standing operating procedures should also require defense counsel to maintain accurate client lists, and each USATDS office should establish files recording the names of all clients seen by attorneys in that office. Similarly, newly assigned defense counsel should prepare and retain client lists from previous duty assignments as well as records of actions or cases in which they previously participated. Relying simply on memory is inadequate because most military attorneys see a large number of clients on a variety of matters. The supervisor should request copies of these lists since the attorney-client privilege does not encompass records that merely identify former clients.[69] The simple expedients of reviewing lists of former clients and cases with the supervisory attorney and routinely scanning these records when accepting new cases or clients is a highly effective means of avoiding possible violations of conflict of interest rules.

In *United States v. Fowler*[70] a trial counsel prosecuted a former legal assistance client for writing bad checks.

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[59] *Id.*

[60] *Id.*

[61] *Smith*, 26 M.J. at 153-54.

[62] R.P.C., Rule 1.6.

[63] *Id.*, Rule 5.3. The conduct of a paralegal employed by a civilian law firm may result in the disqualification of that firm.

[64] *Id.*, Rule 1.16.

[65] *Id.*, Rule 1.2(c).

[66] *Id.*, Rule 1.7(b)(2).

[67] O'Dea, *supra* note 49, at 723.

[68] *Id.* at 718-19.

[69] *Id.* at 724.

[70] *Fowler*, 6 M.J. at 501.

The court found a clear conflict of interest in this case because the trial counsel during his tour as a legal assistance attorney helped the accused on matters relating directly to problems associated with an overdrawn checking account. The court concluded that the trial counsel was disqualified and set aside the accused's conviction, a result which easily could have been prevented.

Private practitioners often use "Chinese Walls" or internal artificial barriers to insulate firm members so that their familiarity with cases involving former or current clients cannot form the basis for disqualification of the firm.[71] "Chinese Walls" are designed to rebut any presumption that confidences have been shared improperly. They serve to prevent discussion of sensitive matters, limit the circulation of privileged documents, and restrict access to files. This approach could effectively be used in military practice to ensure that attorneys and staff members do not inadvertently reveal disqualifying information to other office personnel.

Under Rule 1.16, a supervisory attorney has the authority to grant permission to withdraw from representation.[72] If a supervisor determines that a subordinate is disqualified as a result of a conflict, he or she must also decide whether the newly assigned counsel should be permitted access to the disqualified attorney's work product.[73] As a general rule, if someone who did not possess disqualifying confidential knowledge, such as a paralegal conducting witness interviews or routine nonfactual legal work, created the work product, then access to it is permissible.[74] If, however, disqualification results from prior representation in matters substantially related to the second case, then the possibility of prejudicial taint is quite substantial since confidential information may well appear throughout the documents in question.[75] In this situation, the supervisor should deny access to the disqualified attorney's files. In deciding to withhold such access, the supervisor must always seek to minimize the adverse impact of disqualification on the client.[76] A careful balancing of competing interests is essential. Loss of access to finished work product will inevitably necessitate time consuming duplication of effort and hence may be disadvantageous to the client's interests.

Conclusion

Under military law, appellate courts test counsel conflicts of interest for prejudice to a party in the case. If no prejudice is found, the case will be upheld on appeal even if the record of trial reveals an ethical violation.[77] The Court of Military Appeals addressed this issue in *United States v. Davis*[78] and stated in a footnote that "[i]n appointing trial personnel, a convening authority and his staff judge advocate should take into account any military relationships that later may lead to a claim that defense counsel's professional judgment has been impaired."[79]

In this case, the investigating officer was the defense counsel's rater. Similarly in *United States v. Smith*,[80] a case involving a motion to disqualify the trial counsel, Chief Judge Everett of the Court of Military Appeals observed in a footnote to his concurring opinion that "it would have been desirable if a trial counsel had been appointed whose participation was not subject to a question of conflict of interests."[81] The *Davis*[82] and *Smith*[83] decisions clearly imply that appointment of counsel impaired by actual or possible conflicts of interest must be avoided. This article has suggested several practical means for minimizing conflict problems in military defense practice. Implementation of these suggestions will significantly reduce the risk of inadvertent ethical violations by USATDS counsel.

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[71] Note, *Chinese Wall Defense to Law Firm Disqualification*, 128 Univ. Pa. L. Rev. 1677 (1980). *See also* Manning v. Warring, 849 F.2d 222 (6th Cir. 1988).

[72] R.P.C., Comment to Rule 1.16.

[73] This discussion does not address access to work product when the attorney has been disqualified or removed from the case due to ineffective assistance or misconduct. It also does not address situations in which the client's misconduct causes the attorney's withdrawal.

[74] Note, *Access to Work Product of Disqualified Counsel*, Univ. of Chi. L. Rev. 443, 469-72 (1987).

[75] *Id.*

[76] R.P.C., Comment to Rule 1.16.

[77] *See generally* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 502; R.P.C., Rule 1.6; *Board of Education of New York City*, 590 F.2d at 1241; Bottaro v. Hatton Associates, 680 F.2d 895, 896 (2d Cir. 1982). Courts invariably test for prejudice to the accused under the pertinent rules governing professional ethics. In the absence of prejudice, courts take no corrective action despite counsel's ethical violation.

[78] United States v. Davis, 20 M.J. 61 (C.M.A. 1985).

[79] *Id.* at 65 n.2.

[80] *Smith*, 26 M.J. at 152.

[81] *Id.* at 156 n.1.

[82] *Davis*, 20 M.J. at 61.

[83] *Smith*, 26 M.J. at 152.

Government Appellate Division Note

Charting Scylla and Charybdis: A Guide for Military Judges and Trial Counsel on Admitting Evidence of Other Crimes to Prove Intent

Captain Karen V. Johnson
Government Appellate Division

Introduction

The admissibility of "[e]vidence of other crimes, wrongs or acts .... as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" is specifically permitted by Military Rule of Evidence 404(b).[1] This rule is taken without change from the federal rule.[2] It is interesting to note that "[r]ule 404(b) of the Federal Rules of Evidence is viewed as an 'inclusionary rule' under which other-crimes evidence is admissible except when it tends to prove only criminal disposition."[3]

Whether evidence of other crimes is materially relevant to an issue other than an accused's "criminal disposition" is critical in evaluating admissibility. The military judge and trial counsel are caught between Scylla and Charybdis and must chart their passage carefully; in a borderline case, a decision not to admit other-crimes evidence may result in an undeserved acquittal, but the admission of such evidence may result in a reversal if a conviction is obtained.

While Military Rule of Evidence 404(b) pertains to the admissibility of other-crimes evidence on a variety of bases, the focus of this article is the use of such evidence to prove intent.

The Historical Perspective

The exclusion of evidence of one crime to show that an accused has a disposition or propensity to commit another crime (sometimes referred to as the "propensity rule") is one which is fundamental to Anglo-American jurisprudence and is rooted in the Magna Carta.[4] As stated by Judge (later Justice) Cardozo in *People v. Zackowitz*,

> the principle back of the exclusion is one, not of logic, but of policy.... There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."[5]

The propensity rule does not preclude the admission of other-crimes evidence when that evidence is relevant to issues other than the defendant's predisposition to commit the crime.

Using Other-Crimes Evidence to Prove Intent

Intent is at issue in almost every criminal case because it is derived from the elements of the offense, and it is often "difficult or impossible to differentiate between the intent to do an act and the predisposition to do it."[6] Hence, the use of other-crimes evidence to prove intent has been the subject of intense litigation.[7] The outcome of this litigation is simply that where intent is not con-

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[1] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b) [hereinafter Mil. R. Evid. 404(b)]. For a comprehensive examination of the admissibility of other crimes evidence see Gilligan, *Uncharged Misconduct*, The Army Lawyer, Jan. 1985, at 1; Thwing, *Military Rule of Evidence 404(b): An Important Weapon in the Trial Counsel's Arsenal*, The Army Lawyer, Jan. 1985, at 46.

[2] Mil. R. Evid. 404(b) analysis, app. 22, at A22-32 [hereinafter Mil. R. Evid. 404(b) analysis at A22-32].

[3] Thompson v. United States, 546 A.2d 414 n.18 (D.C. App. 1988).

[4] *Id.* at 418 (citing People v. Molineux, 168 N.Y. 264, 291, 61 N.E. 286, 293 (1901)).

[5] *Id.* at 418-19 (citing People v. Zachkovitz, 254 N.Y. 192, 197-98, 172 N.E. 466, 468 (1930)); *accord* Drew v. United States, 331 F.2d 85, 89-90 n.8 (D.C. Cir. 1964).

[6] *Thompson*, 546 A.2d at 420.

[7] *Id.* at 421 ("If the 'intent exception' warranted admission of evidence of a similar crime simply to prove the intent element of the offense on trial, the exception would swallow the rule.").

tested such evidence is irrelevant.[8] The operative questions then are: when is intent a material issue and what is the standard of admissibility of other-crimes evidence?

The state of mind of the accused at the time he committed the act charged becomes a material issue when evidence of innocent intent is presented. Innocent intent is presented when an accused "has conceded doing the act or because the court instructs the jury not to consider the evidence until they find that the defendant did the act and they proceed to determine intent".[9]

Negating innocent intent differs with regard to specific and general intent crimes in the sense that the issue of intent may be more obviously at issue in specific intent crimes such as assault with intent to commit another crime, attempted rape, wrongful appropriation, and desertion.[10] With respect to general intent crimes such as violating general regulations, and possessing, selling, and using controlled substances, evidence of uncharged misconduct is not admissible unless the evidence raises—or appellant asserts—affirmative defenses such as lack of mens rea, mistake of fact, inadvertence, accident, or entrapment.[11] Further, "if the crime requires only a general criminal intent, evidence of specific intent or knowledge may be unnecessary and inadmissible under Rule 404(b)."[12]

The standard for the type of other-crimes evidence that may be used to prove intent is less stringent than that required to prove a common plan.[13] The evidence need not be an exact match, amounting to almost a repeat of the charged act. Rather, "[e]vidence of merely a prior occurrence of an act similar in its gross features—*i.e.*, the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer" as the charged act is sufficient to negate innocent intent.[14]

When the trial counsel seeks to admit other-crimes evidence to negate the innocent intent of an accused, the decisionmaking process is as follows: 1) Does the crime involve specific or general intent? 2) Will the defense deny the intent to commit the charged act? Denial of the intent to commit the charged act for a specific intent crime such as assault with intent to commit rape would take the form of an admission of the assault with a denial of the intent to commit rape. Denial of the intent to commit a general intent crime would involve the assertion of an affirmative defense such as mistake of fact.

The Proper Timing of the Decision Whether to Admit Other-Crimes Evidence

In *Thompson v. United States* the court held "that the decision whether other crimes evidence is admissible under the intent exception should ordinarily be deferred until the trial judge has sufficient knowledge of the government's need for the evidence, and of the defendant's defense, to make an informed judgment."[15] Likewise, the *Military Rules of Evidence Manual* urges that "it is wise for the court to decline to admit evidence of other acts to prove intent until the defendant has an opportunity to put on evidence."[16]

The military judge would be well advised to defer ruling on the admissibility of other-crimes evidence until such time that the evidence in question is actually offered at trial and is material to the government's case. The evidence may not be material until after the presentation of the defense case-in-chief. At that time, any defenses will have been asserted, and the military judge will be in the best position strategically to evaluate: 1) actual defenses presented; 2) whether innocent intent has become a material issue; 3) the government's need for the contested evidence; and 4) whether the probative value of the evidence is outweighed by the prejudicial impact it may have.[17]

Collateral Estoppel and the Admission of Other-Crimes Evidence

It is a well settled legal principle that evidence of a prior act of misconduct of which an accused has been

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[8] *See* United States v. Gamble, 27 M.J. 298 (C.M.A. 1988); Thompson v. United States, 546 A.2d 414 (D.C. App. 1988); United States v. Danzey, 594 F.2d 905 (2d Cir. 1979).

[9] *Danzey* at 912 (citing 2 J. Wigmore, *Evidence* § 302, at 196-201 (3d ed. 1940)).

[10] Gilligan, *supra* note 1, at 12.

[11] *Id.*; *see* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916.

[12] *Danzey* at 914 n.10 (citing United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir. 1978) ("knowledge and intent were only technically at issue and not really in dispute")).

[13] *Id.* at 913 n.69 (This is in contrast to the situation "where the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test.").

[14] *Id.*

[15] 546 A.2d at 423.

[16] S. Saltzburg, L. Schinasi, D. Schlueter, Military Rules of Evidence Manual 362 (2d ed. 1986).

[17] Mil. R. Evid. 403.

acquitted is not barred by the doctrine of collateral estoppel and is properly admissible in the government's case-in-chief if it meets the requirements of Military Rules of Evidence 404(b) and 403.[18] The limited use of a prior acquittal to rebut a claim of innocent intent is a conservative approach and as such exemplifies the proper use of such information.[19]

Conclusion

Evidence of other crimes is admissible to prove intent if either specific or general intent is being contested. It is incumbent upon trial counsel to show that the purpose of seeking to admit other-crimes evidence is not to prove that the accused is a bad person who probably committed the crime charged. An argument that "a quarrelsome defendant is more likely to start a quarrel than one of milder type" will not suffice.[20] Rather, trial counsel must demonstrate that such highly prejudicial evidence is necessary to controvert a material fact which the defense had put in issue: the innocent intent of the accused with respect to the crime charged. In order to effectively accomplish this objective, trial counsel should determine whether the crime involves specific or general intent and whether the evidence refutes either the specific intent of the accused to commit the crime charged or an affirmative defense.

The trial judge, as the arbiter of the dispute involving the admissibility of the contested evidence, should defer ruling until such time as he or she is strategically in the best position to determine what defenses have been raised and to evaluate the government's need to present the evidence. The best time to make that decision is after the defense rests.

Other-crimes evidence properly admitted for a proper purpose is essential to a successful resolution of cases where innocent intent has been raised. When used for this valid purpose there is no violation of the "propensity rule," nor is there any infringement on the fundamental right of an accused to a fair trial.

[18] *See* United States v. Hicks, 24 M.J. 3 (C.M.A. 1987).

[19] It is important to note that Rule 404(b) "expressly allows use of evidence of misconduct not amounting to a conviction." Mil. R. Evid. 404(b) analysis at A22-32.

[20] *Thompson*, 546 A.2d at 418.

Trial Judiciary Note

Mistake of Fact, Specific Intent, and *U.S. v. Langley*

Lieutenant Colonel Patrick P. Brown
Third Judicial Circuit, Circuit Judge, Ft. Bliss, TX

Rule for Courts-Martial 916(j) discusses the defense of mistake of fact. Essentially, if the accused believed the circumstances to be such that his conduct would not be criminal if his belief were correct, then he cannot be convicted of the offense even if his belief is incorrect. However, the rule limits the nature of the belief that will amount to a defense:

> If the ignorance or mistake goes to an element requiring ... specific intent ... the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.[1]

Although the Rule takes very little space in the Manual, its application is not always as obvious as its brevity might suggest, not because the rule is not clear, but because of a failure to properly recognize what specific intent is required for the particular offense in question.

[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(j) [hereinafter MCM, 1984, and R.C.M., respectively].

This appears to be the problem encountered by the Army Court of Military Review in *United States v. Langley*.[2] To evaluate the opinion in this case, it is helpful to briefly review case law dealing with the nature of specific intent in various offenses.

Larceny is one of the more common offenses containing a specific intent as an element and is frequently the subject of reported cases. The first element of this offense is that the accused wrongfully take property from another. The second element is that the taking be "with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner."[3] This intent is commonly referred to as the "intent to steal."[4] Although this intent is sometimes referred to as the intent to "permanently deprive" to distinguish it from the lesser included offense of wrongful appropriation (which requires only an intent to "temporarily deprive"),[5] the period of the deprivation is only part of the intent. Equally important is that the intended deprivation be from the owner or other proper possessor of the property. Therefore, a mistake as to the ownership of the property, which might seem to go only to the wrongfulness of the taking, not to the intent to deprive, is a mistake that affects the specific intent.

In *United States v. Nix*[6] the accused was convicted of larceny by accepting payments to which he was not entitled. At trial he argued, and the law officer appropriately instructed, that an honest mistake as to his entitlements to the property, however unreasonable, would be a defense to the charge of larceny. The Court of Military Appeals fully agreed that "[t]here can be no doubt ... that an honest mistake—quite without regard to its reasonableness—constitutes a complete defense to the offenses herein involved."[7] Clearly, such a mistake has no effect on how long the accused intended to keep the property, but only on the ownership of the property.

An offense that less obviously requires the specific intent to steal is robbery. In *United States v. Kachougian*[8] the accused was convicted of felony murder during an attempted robbery, and also of the attempted robbery of a second victim. He defended on appeal on the basis that he believed he was assisting another soldier to recover money that had been earlier stolen from that other soldier. The court accepted that robbery is a compound offense, consisting of an assault and a larceny. "Therefore, we can accept, as a general principle of law, that a person is not guilty of robbery in forcibly taking property from the person of another, if he does so under a bona fide belief that he is the owner of such property, or is assisting an owner."[9] Although this defense has been referred to as a "claim of right"[10] defense or as "self-help,"[11] it is more specifically a particular example of the mistake of fact defense. As the dissenting judge stated in *Kachougian*, "If the court believed that Kachougian possessed an honest belief that he was merely helping Starr to recover money stolen from him, Chae's death would have occurred in the course of an aggravated assault rather than as a result of an attempted robbery."[12] This is true, even though the evidence clearly indicated that Starr was not, and did not believe that he was, actually recovering his own property.[13]

In *United States v. Cunningham*[14] the accused was convicted pursuant to his plea of robbery. On appeal, the

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[2] 29 M.J. 1015 (A.C.M.R. 1990).

[3] MCM, 1984, Part IV, para. 46a(a)(1).

[4] MCM, 1984, Part IV, para. 46c(1)(f)(i).

[5] MCM, 1984, Part IV, para. 46a(a)(2).

[6] 29 C.M.R. 507 (C.M.A. 1960).

[7] *Id.* at 511.

[8] 21 C.M.R. 276 (C.M.A. 1956).

[9] *Id.* at 282.

[10] *See* United States v. Cunningham, 14 M.J. 539, 541 (A.C.M.R. 1982).

[11] *See* United States v. Eggleton, 47 C.M.R. 920, 922 n.2 (C.M.A. 1973).

[12] 21 C.M.R. at 288.

[13] The "claim of right" defense is not unlimited. *See* United States v. Petrie, 1 M.J. 332 (C.M.A. 1976) (cannot claim a right to recover the value of stolen hashish, because there is no right to possess the drug in the first place); *but see* United States v. Mack, 6 M.J. 598 (A.C.M.R. 1978) (honest mistake as to identification of victim, accused intending to recover money he had given a different woman to buy drugs for him); United States v. Cunningham, 15 M.J. 282 (C.M.A. 1983) (accused not guilty of attempted robbery if trying to force victim to pay money due to a prostitute for her services).

[14] 14 M.J. 539 (A.C.M.R., 1982), *rev'd*, 15 M.J. 282 (C.M.A. 1983).

Army Court of Military Review reduced the offense to attempted robbery. Although the court was satisfied that the accused intended to take money from the victim "'then and there' when he put the knife to [the victim's] throat,"[15] the actual taking of the money was not done from the person of the victim. On further appeal, the Court of Military Appeals reversed this conviction, holding that the accused "did not contemplate the taking of any property belonging to the victim,"[16] because he was merely trying to get the victim to pay for services he had received from a prostitute for whom the accused was providing protection. Therefore, the accused did not have the requisite intent to steal.

Other compound offenses that may involve larceny and require the intent to steal are housebreaking and burglary.[17] In *United States v. Roberge*[18] the accused pleaded and was found guilty of housebreaking with the intent to commit larceny and of several larcenies. The Court of Military Appeals set aside the housebreaking conviction because the plea inquiry indicated that the accused intended to ensure the victims received their property back and that he would have acted differently if he had not wanted them to recover the property. Because this intent was inconsistent with the intent to steal, the housebreaking with intent to commit larceny could not stand, although housebreaking with intent to commit wrongful appropriation was sufficiently admitted by the plea.[19]

Although it does not deal directly with the defense of mistake of fact in either housebreaking or burglary prosecutions, *United States v. Smith*[20] clearly suggests that an honest mistake of fact as to the ownership of property that was the subject of an unlawful entry with larcenous intent would be a defense to the major offense. The accused in that case was convicted of larceny of clothing articles and a suitcase. His defense was that he was only taking clothing that he believed belonged to an individual who owed him money and who had authorized him to take the clothing if the debt was not paid. The accused on appeal then complained that the law officer refused to instruct on wrongful appropriation as a lesser included offense. The Court of Military Appeals held that the lesser offense was not raised by the evidence in the case and that the accused's version of the facts amounted to a complete defense to larceny or wrongful appropriation. Under those facts, "[a]t the most, he would have been guilty of a criminal trespass upon [the victim's] property, an offense not charged."[21] Under this reasoning, then, a charge of housebreaking or burglary with the intent to commit larceny within the structure would fall to no more than unlawful entry if the accused believed he had a right to possession of the articles sought to be "stolen."

Offenses that are very similar to burglary and housebreaking, as far as the intent required is concerned, are attempt and the various assaults with intent to commit other specific crimes. The essential elements of an attempt are an overt act, "done with specific intent to commit an offense under"[22] the Uniform Code of Military Justice. Although neither the Code nor the Manual goes into detail as to the intent, the law is clear that the intent must encompass every element of the offense attempted.[23]

Specifically, in *United States v. Thomas*[24] the accused was convicted of attempted rape. Although the issue was impossibility,[25] the case contains a thorough discussion of attempt as a criminal offense. Discussing the intent required for this particular offense, the court defined this element as: "each [actor] intended to have sexual intercourse with a female not his wife by force and without her consent."[26] Quoting an earlier article on the question, the court stated: "There can be no criminal liability for an attempt without proof of a specific intent to effect the particular criminal consequence which constitutes the crime attempted. In other words, at least one of the defendant's objectives ... must constitute ... the crime attempted."[27] Clearly, then, an attempt to commit rape requires a specific intent which encompasses every element of the offense of rape.

Although not identical to attempt, very closely related offenses are the various assaults with intent to commit other offenses, in violation of article 134. Each of these

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[15] 14 M.J. at 541.

[16] 15 M.J. at 282.

[17] *See* Uniform Code of Military Justice arts. 129, 130, 10 U.S.C. §§ 929, 930 (1982); MCM, 1984, Part IV, paras. 55 and 56.

[18] 39 C.M.R. 157 (C.M.A. 1969).

[19] Note that this offense actually includes two specific intents: 1) the intent to commit the offense of larceny within the structure, which includes 2) the intent to steal, as an element of the intended larceny.

[20] 8 C.M.R. 112 (C.M.A. 1953).

[21] *Id.* at 114.

[22] MCM, 1984, Part IV, para. 4a(a). Additional elements tend to quantify the overt act requirement.

[23] *See* United States v. Roa, 12 M.J. 210 (C.M.A. 1982) (intent to kill required for attempted murder); Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-2b (1 May 1982).

[24] 32 C.M.R. 278 (C.M.A. 1962).

[25] The specific issue was whether it was attempted rape if the victim was dead but the accused was unaware of that fact.

[26] 32 C.M.R. at 291.

[27] *Id.* at 289 (quoting Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821, 858 (1927)).

has just three elements: an assault; a contemporaneous intent to commit the specified offense; and prejudice to good order and discipline.[28] This intent is essentially identical to the intent required for the offenses of attempting to commit any of the offenses identified in that paragraph of the Manual.[29]

Recognizing that an offense has specific intent as an element is not, in itself, sufficient to evaluate the defense of mistake of fact. The simple rule of the Manual is that if a specific intent is a required element of an offense, any honest mistake of fact that would negate that required specific intent is a complete defense to that offense, no matter how unreasonable that mistake might be. This does not, however, support a general statement that a mistake of fact need only be honest to be a defense to a specific intent crime. In *United States v. McFarlin*[30] the Army court faced the issue of mistake of fact in an indecent assault case. The mistake had to do with the victim's consent, and the trial judge had instructed that this mistake, to be a defense, must be both honest and reasonable. The accused argued that indecent assault was a specific intent crime, so the mistake need only be honest. The court examined this claim and rightly concluded that the mistake in this case had no relation to the specific intent required.[31] Because the intent did not negate the specific intent, but related only to the victim's state of mind, the trial judge was correct in ruling that it needed to be both honest and reasonable.

McFarlin appears to be a correct application of this defense, but in *United States v. Langley*[32] the Army court relied on *McFarlin* to rule that a mistake of fact must be both honest and reasonable in order to be a defense to a charge of assault with intent to commit rape. Although the opinion is very brief and the issue is not clearly set out, it appears that the mistake, as in *McFarlin*, was as to the victim's consent to the accused's conduct.[33] An honest mistake as to the consent of the victim should be a complete defense to the crime in this case because it would negate the accused's intent to "have sexual intercourse with a female not his wife by force and without her consent."[34] The accused might very well be guilty of indecent assault, as a lesser included offense of the charged offense, if his mistake were unreasonable. If his mistake were reasonable, as required by the Army court, then it follows that he would be guilty of no offense, because even simple assault requires the lack of consent of the victim, and an honest and reasonable mistake as to that consent would be a complete defense.[35]

Langley is not the first time that this issue has faced the appellate courts. In *United States v. Short*[36] the accused had been convicted of assault with intent to commit rape and had defended on the basis that he believed that the victim was a prostitute and that they had arrived at a business arrangement. The accused requested an instruction placing this defense before the court, but the law officer refused to so instruct. On appeal, the Court of Military Appeals affirmed the conviction. Chief Judge Quinn wrote the lead opinion and concluded that the accused's request for instruction was erroneous as a matter of law, because it failed to require that the mistake be both reasonable and honest.[37] Judge Latimer concurred in the affirmance, but his opinion does not specifically join the reasoning of the Chief Judge. Rather, Judge Latimer's opinion reflects the view that the accused had not presented a defense of mistake of fact, but simply the defense that the victim was a prostitute plying her trade, a question of fact for the court to determine.[38] Judge Brosman, on the other hand, disagreed with the ruling on the mistake of fact, and spent some time discussing the issue. Although rape requires only a general intent, assault with intent to commit rape is different. "[T]he very designation of the offense indicates the requirement of a specific intent.... Assault with intent to commit rape demands

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[28] MCM, 1984, Part IV, para. 64b.

[29] *See* United States v. Winston, 27 M.J. 618 (A.C.M.R. 1988) (assault with intent to murder requires the specific intent to kill); United States v. Roa, 12 M.J. 210 (C.M.A. 1982) (assault with intent to rape requires specific intent to rape).

[30] 19 M.J. 790 (A.C.M.R. 1985).

[31] The specific intent in indecent assault is "the intent to gratify the lust or sexual desires of the accused." MCM, 1984, Part IV, para. 63b(2).

[32] 29 M.J. 1015 (A.C.M.R. 1990).

[33] "[I]n both McFarlin and this case the consent of the respective victims was at issue." 29 M.J. at 1017.

[34] United States v. Thomas, 32 C.M.R. 278, 291 (C.M.A. 1962).

[35] "[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j).

[36] 16 C.M.R. 11 (C.M.A. 1954).

[37] 16 C.M.R. at 19. This is the same as the holding of the *Langley* court, of course. *Short*, however, was not cited by the *Langley* court.

[38] *Id.*

proof of an assault on the prosecutrix accompanied by an intent to have unlawful sexual intercourse by force and without her consent—a purpose to overcome any resistance by force. Manual for Courts-Martial, United States, 1951, paragraph 213d(1)(c)."[39] Because this intent includes the element of accomplishing the sexual intercourse without the consent of the victim, a mistaken belief that the victim was consenting would be inconsistent with such an intent and would, therefore, be a defense. The assault, on the other hand, is only a general intent crime, and any mistake as to the victim's consent would have to be reasonable to excuse that offense.[40]

Although Short lost his appeal, it appears that Judge Brosman's opinion is better reasoned and should be the law if the issue again reaches the Court of Military Appeals. In *United States v. Roa*,[41] where the court distinguished between offenses that require only a general intent and attempts or assaults with intent to commit such offenses, the court noted that "intoxication may relieve of culpability for an attempt to commit an offense such as rape or assault with intent to commit rape when it would not be a defense in a prosecution for commission of the principal offense."[42] Voluntary intoxication is similar to an honest mistake of fact in that it can rebut actual knowledge or specific intent, while not being a defense to other offenses not requiring a specific mental element.[43] If voluntary intoxication is a defense, it is because it negates the specific mental element of the offense, and this is when an honest mistake of fact is sufficient as a defense.

Requiring only an honest mistake of fact to defend against otherwise criminal activity is sometimes an uncomfortable concept, because it seems to reward negligence or even recklessness.[44] In the aspect of "claim of right" or "self-help," it has been suggested that it leads to violence and chaos, and so should be strictly limited.[45] If we are to define crimes not only in terms of the conduct of the offender (actus reus), but also in terms of the offender's state of mind (mens rea), and therefore require proof beyond reasonable doubt of both, then there is no way to eliminate such a defense, to the extent that it raises a reasonable doubt as to the accused's mental state.

When faced with any charge that requires a specific intent or knowledge, therefore, counsel must be alert to this defense. The trial judge must likewise be alert, in order to recognize it during a guilty plea inquiry or properly instruct the court members when they are trying the facts. Such instructions can be rather convoluted. When the members have to be informed that an honest mistake will excuse the offense charged, but that it must also be reasonable to excuse the lesser included offenses, such convolution is not uncommon.[46] The court members have shown an ability to apply such instructions with common sense and fairness. As *Langley* and *Short* both indicate, however, the issue must be examined, not merely cursorily disposed of.

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[39] 16 C.M.R. at 20. The current Manual provision is: "[T]he accused must have intended to overcome any resistance by force, and to complete the offense. Any lesser intent will not suffice." MCM, 1984, Part IV, para. 64c(4).

[40] 16 C.M.R. at 21.

[41] 12 M.J. 210 (C.M.A. 1982).

[42] *Id.* at 213 n.3.

[43] R.C.M. 916(l)(2).

[44] The question in *Roa* was whether conduct in wanton disregard for human life could be a basis for attempted murder, without a specific intent to kill. Despite Judge Cook's dissent, the majority held that it could not.

[45] *See* United States v. Smith, 14 M.J. 68, 70 (C.M.A. 1982); *Eggleton*, 47 C.M.R. 920 (C.M.A. 1973); *Cunningham*, 14 M.J. 539 (A.C.M.R. 1982).

[46] Consider the instructions on self-defense in an aggravated assault case when the defense is also raised as to the least offense of simple assault. *See* Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 5-2 (1 May 1982).

Contract Appeals Division Note

When Winning Isn't Enough: Boards of Contract Appeals and Monetary Sanctions for Frivolous and Bad Faith Conduct in Administrative Litigation

Lieutenant Colonel Clarence D. Long III
Chief, Army Bid Protest Team

Introduction

Consider the following fact patterns:

—Agency counsel in a post-award dispute falsely denies the existence of a technical evaluation of appellant's claims for nine months, despite the fact that appellant had requested just such an evaluation. The theory behind the denial is apparently that, because the technical evaluation was sent to counsel rather than to the contracting officer, it is therefore privileged. At the

hearing, the agency attempts to introduce portions of the technical evaluation through the testimony of the technical evaluator.

—The solicitation for an extremely high dollar automatic data processing (ADP) procurement closed many months ago. Suddenly, a protest against the terms of the solicitation is filed with the General Services Board of Contract Appeals (GSBCA). The protester alleges an agreement was made to waive timeliness and further contends that the solicitation has been constructively cancelled. After depositions and extensive written argument, the protest is dismissed for untimeliness. (Both of the assertions by the protester are found to be untrue.) In the meantime, the procurement has been partially suspended for a number of weeks. About 500 hours have been spent litigating the case, with many more hours spent by support personnel at the requiring and buying activities.

—The protester in a vitally needed CPU upgrade asserts that the evaluation scheme is stacked against the computers it desires to propose. During discovery, it becomes apparent that the protester has no alternative scheme of evaluation it is willing to describe, nor is the protest restricted to the machines that it contends are disadvantaged by the system. Moreover, in a previous protest it has taken a position opposite to that it is now taking and refuses to produce the relevant brief. The protest is dismissed as frivolous, but in the meantime the procurement is suspended for four weeks, and the attorneys, the buying command, and the requiring activity have spent one thousand or more man-hours litigating the protest.

What can be done about deterring such behavior? Probably little, under the current state of decisional law. The administrative boards charged with resolving protests and post-award disputes have been reluctant to impose monetary sanctions for even the most flagrant abuses of the administrative legal process. They have been reluctant to even acknowledge that they have such authority. This reluctance has been exacerbated by the fact that few government agencies will request that the boards of contract appeals impose monetary sanctions. Appellants and protesters are only somewhat more likely to do so. The problem, thus, has been two-fold: nonaggressive attorneys satisfied with merely winning cases, while leaving outrageous conduct otherwise undeterred; and the boards' reluctance to impose sanctions, especially monetary, on their own initiative.

The consequences of unpunished frivolous or bad faith behavior are extremely serious. Both government agencies and contractors develop a degree of contempt for the administrative litigation process. The process can be perceived as a game in which the object is to continually cloud the issues and prolong the litigation to force a favorable resolution. Serious protesters and appellants do not receive the attention and consideration their cases deserve. Even protesters and appellants with real grievances may not bother to separate the wheat from the chaff in filing the protest or appeal, surrounding the real complaint with a host of unsupported allegations.[1] Similarly, agencies may feel encouraged to file a host of meritless defenses, knowing that the only real penalty will be a sustained appeal or protest.

Why are monetary sanctions needed to deter such behavior? After all, the boards do, on occasion, dismiss cases for frivolous behavior.[2] Sometimes these dismissals are accompanied by harsh words for counsel. Is this not enough to deter such behavior, to the extent it can be deterred? The author thinks not. Monetary sanctions carry a message mere dismissal does not. The protester, appellant, or agency is being required to pay for its irresponsible behavior. The prevailing party is being compensated for the endless hours spent by counsel, contracting personnel, and supporting staff in defending or prosecuting administrative litigation that should not have been brought in the first place, has been irresponsibly defended or prosecuted, or was unreasonably complicated or prolonged by obstructive or dilatory tactics.

The Federal Court Standard

Inherent Power

Most practicing attorneys think in terms of Federal Rule of Civil Procedure 11 (Rule 11) or perhaps one of its state equivalents when the issue of sanctions is raised. But the authority to impose sanctions, including monetary sanctions, is older, deeper, and broader than that or any other formal rule.[3]

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[1] The GSBCA, which awards attorneys fees as a matter of course to prevailing protesters, will occasionally reduce attorney fee requests substantially if it perceives that the protester used a "shotgun" approach. *See* U.S. West Information Systems, Inc., GSBCA Nos. 9114-C(8995-P), 9255-C(9103-P), 89-2 BCA ¶ 21,774, 1989 BPD ¶ 119.

[2] *See* ViON Corporation, GSBCA No. 10218-P, 90-1 BCA ¶ 22,287. *See also* Bulloch International, Inc., GSBCA No. 10244-P, 90-1 BCA ¶ 22,330.

[3] Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975). The Supreme Court held, *inter alia*, that not withstanding the "American Rule," the federal courts possess the inherent power to impose attorney's fees upon a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Nor is this authority limited to particular delineated types of conduct. In a recent decision affirming the sanctions imposed by a federal district court, the Fifth Circuit stated:

> We are not persuaded the Court [in *Alyeska*] intended to upset the view, nigh unchallenged in the history of our country, that the federal courts have inherent power to police themselves by civil contempt, imposition of fines, the awarding of costs, and the shifting of fees....
>
> It is a given that federal courts enjoy a zone of implied power incident to their judicial duty. From the Judiciary Act of 1789 forward its functional necessity has not been seriously questioned. Rather the task is one of defining its limits.[4]

The court went on to specifically reject the argument that "inferior federal courts may look only to rules of procedure and specific statutes providing remedies for obstructive conduct,"[5] holding instead that the inherent authority doctrine both overlaps and exceeds the particular rules addressing particular problems, such as Rule 11. Rather, the court continued, adopting such particular rules supplements inherent power, which derives from necessity and can be exercised on a case-by-case basis as required.

Rule 11

This rule is both more specific than inherent power and less restricted in its application.

Rule 11 provides in pertinent part that:

> the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, *which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney's fees.*[6]

The purpose of Rule 11 is to require

> [g]reater attention by the district courts to pleading and motion abuses and ... [to] impose ... sanctions when appropriate ... [to] discourage ... abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses, ... [and] to reduce the reluctance of the courts to impose sanctions ... by emphasizing the responsibilities of the attorney.[7]

Rule 11 was amended in 1983. The intended effect of the amended rule was to expand "the equitable doctrine permitting the court to award expenses, ... to a litigant whose opponent acts in bad faith in instituting or conducting litigation."[8] With this expansion, a party seeking Rule 11 sanctions need not specifically show that a litigant acted in bad faith. Instead, Rule 11 incorporates a standard of "due diligence," which requires parties and attorneys to make a "reasonable inquiry" before signing pleadings and motions, and to act in a way that is "reasonable under the circumstances."[9] In effect, amended Rule 11 transforms what had been a very restrictive subjective test into a less restrictive "objective" test.[10]

The amended rule has had two main effects. First, parties who have been adversely affected by frivolous or unnecessary litigation now have more incentive to pursue

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[4]Nasco v. Calcasieu Television and Radio, *et al*, No. 89-4137, slip op. at 11 (5th Cir. Feb. 6, 1990).

[5]*Id.* at 13, 14. This decision may represent something close to the outer limits of the inherent authority doctrine in its particulars. Defendant's counsel had twice transferred or removed property in violation of a court order, had filed baseless counterclaims, had listed 100 witnesses and called two, had filed a meritless recusal motion, and had filed a frivolous appeal.

Plaintiff moved for monetary sanctions, which were granted, and the district court, sua sponte, suspended or disbarred defendant's attorneys. In doing so, the court rested on its inherent power. The Fifth Circuit affirmed all of the punishment, remanding the case only to have the district judge consider whether he had, in fact, wanted one of the attorneys disbarred in his home state as well as in Louisiana.

[6]Fed. R. Civ. P. 11 (emphasis added).

[7]Westmoreland v. CBS Inc., 770 F.2d 1168, 1173-74 (D.C. Cir. 1985).

[8]Fed. R. Civ. P. 11 Advisory Committee Note.

[9]Saunders v. Lucy Webb Haynes—National Training School, 124 F.R.D. 3, 8 (D.D.C. 1989) (citing *Westmoreland*, 770 F.2d at 1177). *See also* Rowland v. Fayed 115 F.R.D. 605, 606-07 (D.D.C. 1987).

[10]*Westmoreland*, 770 F.2d at 1177.

Rule 11 relief. Second, courts have more flexibility to impose Rule 11 sanctions on deserving parties. The obvious objective in amending Rule 11 was to reduce the amount of unnecessary litigation to foster a more efficient and effective legal process. The amendment sought to accomplish this objective by holding litigants accountable for frivolous or wasteful litigation.

As noted in the seminal case discussing the amended rule, the federal courts may impose Rule 11 sanctions if a reasonable inquiry would have disclosed that the pleading, motion, or paper is: "(1) not well grounded in fact, (2) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay."[11]

Authority of the Board(s) in Regard to Rule 11 Type Sanctions

Nonmonetary Sanctions at the Board Level

The boards of contract appeals have at one time or another imposed sanctions on both appellants or agencies for inappropriate behavior during the appeals or protests (usually failure to cooperate in discovery). These sanctions have included dismissal, exclusion of exhibits, exclusion of testimony,[12] and findings of fact based on non-appearance of witnesses or non-answers to interrogatories.[13] In doing so, the boards have generally relied upon their inherent authority to control their dockets. For example in *Yucca, a Joint Venture*, the GSBCA stated:

> Our ultimate coercive power over GSA is our statutory authority to issue decisions that are final unless appealed and that may commit the agency to the payment of money to contractors. 41 U.S.C. § 607(d)(g). As an incident thereto, we are also permitted by statute to "authorize discovery and discovery proceedings." 41 U.S.C. 610 (1982). This includes the power to impose sanctions for noncompliance.
>
> If the imposition of sanctions upon a contumacious party is not an incident of our statutory power to authorize discovery, the statute and the board are all bark and no bite.[14]

Monetary Sanctions at the Board Level

As the Third Circuit noted in *Eash v. Riggins Trucking*,[15] the authority to impose monetary sanctions on litigants is an integral part of the federal courts' inherent authority to manage their dockets. The United States Claims Court has also ruled multiple times that the inherent authority of the boards of contract appeals to impose sanctions is *coextensive* with that of the federal courts, and it follows inexorably that the boards also have the authority to impose monetary sanctions where appropriate.[16]

Boards of contract appeals have sometimes accepted (either explicitly or implicitly) this notion of inherent authority. For instance, in both *Department of Energy*[17] and *Times Mirror Land and Timber Company*,[18] two

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[11] *Id.* at 1174-75.

[12] *See, e.g., ViON*, GSBCA No. 10218-P 90-1 BCA ¶ 22,287. Griffin and Dickson, AGBCA No. 74-104-4, 86-1 BCA ¶ 18,601, at 93,311-12; Wordplex Corp., GSBCA No. 8194-P, 86-1 BCA ¶ 18,553, at 93,180; Yucca, a Joint Venture, GSBCA Nos. 6768, 7319, 85-3 BCA ¶ 18,511, at 92,982 (imposing sanctions against the government). For failure to cooperate in discovery, see Charles G. Williams Construction, Inc., ASBCA No. 33766, 89-2 BCA ¶ 21,733 (imposing sanctions against the government).

[13] Eagle Management, Inc., ASBCA No. 35902, 90-1 BCA ——, 1989 ASBCA LEXIS 484. This case came very close to granting of motion for summary judgment. The agency's main witness on the issue of harassment of the contractor failed to show up as directed by the board. Needless to say, his failure to appear resulted in the board finding that the contractor's assertions concerning harassment were correct. *See also* Travelodge of Des Moines, Iowa, Docket No. 512-89-2-1-0, SBA No. 3091, 1989 SBA LEXIS.

[14] *Yucca*, 85-3 BCA ¶ 18,511, at 98,982. This case, which involved dismissal of contractor claims for failure to answer discovery, includes a fairly lengthy discussion of the inherent authority doctrine. *See also Griffin and Dickson*, AGBCA No. 74-104-4.

[15] 757 F.2d 557, 561 (3d Cir. 1985).

[16] *See, e.g.*, Metadure Corp. v. United States, 6 Cl. Ct. 61 (1984); Jo-Mar Corporation v. United States, 15 Cl. Ct. 602, (1988); Griffin and Dickson v. United States, 16 Cl. Ct. 347 (1989). All three of these Claims Court cases involve upholding dismissal sanctions rather than monetary sanctions. However, as the Energy Board of Contract Appeals noted, "[t]he assessment of a monetary penalty is a less drastic sanction than dismissal." The Wm. Powell Company, EBCA No. 341-10-85, 86-3 BCA ¶ 19,253, at 97,378. If the boards have the authority to impose the more drastic sanction, they surely have the authority to impose the lesser. In any event, none of the Claims Court cases limits itself to the sanction of dismissal—all three clearly stand for the proposition that the board's inherent authority for purposes of docket management is coextensive with that of the federal courts.

[17] GSBCA No. 8558-P, 86-3 BCA ¶ 19,075.

[18] AGBCA No. 86-312-1, 87-1 BCA ¶ 19,505.

different boards of contract appeals were requested to impose monetary sanctions under Rule 11. In either case, if the board involved had felt it lacked authority, it could have simply rejected the request on that ground. Instead, both boards looked at the facts and found that monetary sanctions simply were not warranted *under the circumstances.*

One board considered the matter squarely and found it had the "inherent authority" to impose such sanctions. In *The Wm. Powell Company*[19] the Energy Board of Contract Appeals articulated more than one rationale for its imposition of monetary sanctions, but specifically stated its belief that it had the "inherent authority as an adjudicative tribunal" to impose such sanctions,[20] and that the Federal Rules of Civil Procedure "are regarded as establishing appropriate standards of administrative due process and, accordingly, serve as valuable guidelines generally."[21]

In the only decision issued by the Armed Services Board of Contract Appeals (ASBCA) that appeared to rule squarely on the issue, the board declined to impose monetary sanctions against the government for failure to comply with discovery in a timely fashion, despite observing that "the Government conduct in the discovery phase of this litigation has been less than helpful to the fair and expeditious resolution of this appeal. The Government has failed to cooperate in voluntary discovery and displayed a lackadaisical attitude towards compliance with Board orders."[22]

But the board went on to conclude that it had no jurisdiction to award such fees, despite its asserted inherent power to control the discovery process, and to impose a variety of non-monetary sanctions. Stating that sovereign immunity applied, the board ruled that Congress had not expressly authorized monetary awards for such behavior.[23]

The ASBCA has imposed non-monetary sanctions on the government for failure to litigate in good faith, but as yet has declined to impose monetary sanctions. In *Charles G. Williams Construction, Inc.*[24] the board determined that sanctions were appropriate because the agency had falsely denied for nine months that it had conducted a technical evaluation of the appellant's claim. No board order had been requested by the appellant in regard to the technical evaluations, but the board held:

> We are aware that no Board order was issued in this case and that Rule 35, "Sanctions," applies to failure or refusals to obey an order of the Board. However, appellant did not request an order for the obvious reason that it was being told that a technical evaluation did not exist. Our Rule 14(a) encourages the parties to engage in voluntary discovery. In this case the rule was subverted by the Government, which violated the fundamental obligations of fair dealing which underlie voluntary discovery. Accordingly, some sanction is due, otherwise the innocent party who follows our lead under 14(a)—rather than demand Board orders—is penalized.[25]

The appellant in *Williams* had asked for summary judgment on the appeal, for removal of the contracting officer from quantum determination, for payment of costs resulting from undergoing bad faith settlement negotiations, and for payment of legal fees and case preparation costs.

The board granted none of the requests, but it did bar all documents generated by the technical evaluation and also the testimony of the technical evaluator. It briefly alluded to possible lack of authority, without going into details or formally stating that it lacked authority, in denying the request for monetary compensation.[26]

In other recent decisions, the ASBCA has sometimes appeared to shy away even more from its rigid disclaimer of authority in *Turbomach*, without ever actually reversing that holding.[27] The Department of Transportation Board of Contract Appeals (DOT CAB) and the Postal Service Board of Contract Appeals (PSBCA) have both issued similar decisions.[28] Nevertheless, the ASBCA and its concurring counterparts have not yet dealt squarely with this power to award such fees *to the government.*

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[19] EBCA No. 341-10-85, 86-3 BCA ¶ 19,210, *on reconsid.*, 86-3 BCA ¶ 19,253. This is the only board known to have actually imposed monetary sanctions against a litigant.

[20] *Id.* at 97,378.

[21] *Id.* at n.4.

[22] Turbomach, ASBCA No. 30799, 87-2 BCA ¶ 19,756, at 99,953.

[23] *Id.* at 99,954.

[24] ASBCA No. 33766, 89-2 BCA ¶ 21,733.

[25] 89-2 BCA ¶ 21,733, at 109,249.

[26] *Id.* at 109,250.

[27] *See* LTV Aerospace Defense Company, ASBCA No. 37571, 89-3 BCA ¶ 27,249, at 111,820, in which the Armed Services Board cited Turbomach, and stated: "Appellant cites the more recent Claims Court cases in support of its contentions that we may award attorneys fees as a sanction. Since we do not feel that such a sanction is warranted by the facts presented, we do not *choose*, in the present matter to revisit the question of our jurisdiction to make such an award" (emphasis supplied) (citation omitted).

[28] *See, e.g.*, Southwest Marine, Inc., DOT CAB Nos. 1497, 1577, 1645-1666, 1687, 1704-1725, 86-2 BCA ¶ 18,773; Shorthaul Trucking Co., PSBCA No. 1046, 84-1 BCA ¶ 17,012.

The Early GSBCA Position

The GSBCA appeared to face the problem of whether it could impose monetary sanctions against a private litigant in *Commercial Data Center, Inc.*[29] Commercial Data was an intervenor who won a computer maintenance services contract and then successfully defended a protest that claimed that the Defense Logistics Agency had failed to evaluate the competing proposals in accordance with the announced evaluation criteria. Although not carefully articulated, Commercial Data's request for attorneys' fees from the protester appeared to be based on bad faith behavior by the protester, rather than the due diligence standard of Rule 11.

The board denied the request, stating that it did not consider the protest to be frivolous. It then went on to state at length that the GSBCA did not possess the jurisdiction to make such awards anyway. Citing *Roadway Express, Inc. v. Piper*,[30] the board stated:

> Among federal tribunals, only courts established under Article III of the Constitution of the United States generally have such power, and power is inherent in the necessity to protect the ability of these courts to manage their dockets.
>
> ....
>
> This Board is a tribunal established by Congress in the Executive Branch, and our jurisdiction is entirely limited to those matters which Congress has entrusted to us ....[31]

An earlier GSBCA decision, *Hetra Computer and Communications, Inc.*,[32] could also be interpreted as holding that the board does not have the inherent authority to impose a monetary sanction. However, the *Hetra* decision was not cited as authority in the later *Department of Energy* decision, and its brief reasoning does not seem to take into account the board's inherent authority to control its docket, its pronouncements that it will look to the Federal Rules of Civil Procedure for guidance in matters not covered by its own rules, or its statutory authority to grant remedies available to litigants in the United States Claims Court.

The New Standard at the GSBCA

The latest evolution of GSBCA doctrine on the subject of monetary sanctions is embodied in *International Technology Corporation.*[33] ITC had filed a protest against a solicitation to supply off the shelf software, hardware, and maintenance services for an office automation support system, asserting that the terms were both unduly restrictive and ambiguous. The closing date for receipt of the proposals was August 1988, but ITC did not file its protest until the following Spring. As bases for its late filing, ITC alleged that the procurement had been constructively canceled following the solicitation date and that the agency officials had agreed to waive objections on the grounds of timeliness.

In regard to the first contention, the board held that there was simply "no evidence whatever" to support the theory that the agency had cancelled the procurement. With regard to the second, the board found that the Army's offer to consider the protester's objections informally did not amount to an agreement to waive timeliness objections. The protest was dismissed as untimely filed.[34] The Army then moved for monetary sanctions, claiming attorneys fees and related costs.

In its sanctions motion, the Army did not allege a specific desire to mislead on the part of the protester, but did contend that there had been an utter failure to adequately investigate the timeliness issue prior to filing the protest, or to drop the claim in a timely fashion after discovery commenced. The Army further asserted that the board had the authority to impose sanctions both under Rule 11 and under its inherent authority to control its docket.

The board, in issuing its lengthy opinion, followed numerous board precedents in declining to address the question whether it possessed the authority to adopt the standards embodied in Rule 11. It stated that it would be inappropriate to adopt standards, which impose an affirmative standard of conduct upon counsel, in the context of a pending case. It held that, in the absence to an amendment to its rules which incorporates Rule 11, it would not impose sanctions for violations of the rule's requirements.[35]

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[29] GSBCA No. 8496-C(8372-P), 86-3 BCA ¶ 19,129.

[30] 447 U.S. 752, 765-67 (1980).

[31] *Commercial Data*, 86-3 BCA ¶ 19,129, at 96,702, 96,703.

[32] GSBCA No. 8316-P, 86-2 BCA ¶ 18,882.

[33] GSBCA No. 10056-C(10010-P), 90-1 BCA ¶ 22,341, 1990 BPD ¶ 2. This decision includes a lengthy and excellent discussion of the inherent authority doctrine and its applicability to boards.

[34] International Technology Corp., GSBCA No. 10010-P, 89-2 BCA ¶ 21,829, 1989 BPD ¶ 122.

[35] *Int'l Technology*, 90-1 BCA ¶ 22,341, at 112,282.

The board then went on to state that it agreed with the Army position that the board possessed inherent authority to impose sanctions for bad faith behavior. Citing various Supreme Court decisions as precedent, the board held that sanctions authority was necessary for the fulfillment of board functions and is inherent in the vesting in the tribunal of subject matter jurisdiction.[36]

The board held further that boards of contract appeals' case management authority is coextensive with that of the federal courts. The board held that monetary sanctions were no different than the more common sanctions for dismissal. In doing so, the board explicitly overruled what it termed to be "inconsistent" dicta in *Commercial Data Center*.[37]

Conclusion

Most boards of contract appeals have so far declined to rule as to whether they possess "Rule 11" powers, although they appear to accept that, as a result of their inherent authority to manage their dockets, they may impose at least non-monetary sanctions. The GSBCA has gone so far as to assert its right to award monetary damages against appellants and protesters for bad faith behavior under the inherent authority doctrine.

But proving bad faith, as opposed to the less stringent Rule 11 test, is too difficult a chore. It is the author's belief that the equivalent of Rule 11 should be formally adopted by the various boards of contract appeals in order that parties defending, appealing, or protesting before those bodies receive appropriate relief when confronted with frivolous behavior that does not quite reach the bad faith level, but nonetheless violates the reasonable inquiry or due diligence standard. The federal courts found it necessary to adopt such a rule long ago and to amend it recently to make the award of monetary sanctions less difficult. Part of the reason given for the amendment was the clogging of the courts with meritless claims.

The administrative government contract litigation system has not yet adopted such a rule, except for one board. Some boards may feel they lack the statutory authority. Others may feel that this power exists, but that the time is not yet ripe. Still others may feel that such a rule must be adopted, not by decisional fiat, but through the standard administrative rule-making process.

But the only way to protect appellants, protesters, and agencies who litigate in good faith is to deter those who do not. A board level equivalent of Rule 11, with attendant monetary sanctions, is essential to this process. In the meantime, the boards can legitimately follow the lead of the GSBCA and serve notice that bad faith behavior will be costly, even if lack of due diligence goes, for the time being, unpunished.

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[36] *Id.* at 112,284. One reason for the GSBCA's apparent willingness to go one step ahead of the other boards of contract appeals may be the fact that protests before that board, if timely filed, automatically invoke suspension of the procurement. Moreover, all such protests, which involve oral and written discovery, full evidently hearings, and post hearing briefs, must be completed within 45 working days (usually about 64 calendar days). Another reason may be that every time an agency loses a protest, it must pay automatically attorneys fees as determined by the board. In other words, a losing agency is assessed the equivalent of Rule 11 monetary sanctions whenever a protest is sustained, although the standard, is of course, neither bad faith nor "due diligence," but purely statutory.

[37] *Id.* at 11,282-83.

Regulatory Law Office Note

Traditionally, the Army has satisfied its telecommunications requirements by obtaining both basic (monopoly) and nonbasic (competitive) services offered in tariffs filed by regulated telecommunications companies with the various state and federal regulatory commissions. With the advent in recent years of competitive telecommunications companies that are not subject to the same regulatory controls as are the local exchange telephone companies, the Army, the DOD, the civilian federal executive agencies (FEA's), and many other large and small business users have turned to such alternative competitors to procure many of their nonbasic, nonmonopoly, communications needs. Unlike the local exchange telephone companies, all of whose service offerings and rates are subject to regulatory approval, and who cannot vary rates among different customers for essentially similar service, the largely unregulated suppliers of competitive telecommunications services are not so restrained. Thus, such competitive telecommunications companies may provide their services in whatever responsive way or at whatever prices the market-place demands. Specifically, the competitive telecommunications companies have the legal ability to bid for and to consummate Federal Government telecommunications requirements contracts free of regulatory control, whereas the local telephone companies effectively cannot do so.

In this environment the Regulatory Law Office has actively advocated the position before many regulatory

forums that the local exchange telephone companies should be permitted to compete for nonbasic, nonmonopoly competitive services free of the traditional regulatory restraints. This would lead to the lowest possible prices for all users of competitive services, including the Army, while at the same time keeping the local exchange telephone companies from losing business to competitors to the detriment of the users of their monopoly services, that is, the residential users who would have to make up the lost revenues through much higher telephone bills.

To date, however, the various regulatory commissions have been reluctant to relax their authority over competitively bid contracts when the would-be vendor is a regulated local exchange telephone company. Competitively bid contracts for nonmonopoly services to be provided by the local telephone companies are being permitted by the commissions to an increasing extent—but in most states only upon approval of the contract by the particular commission. Such approval, however, effectively precludes any local exchange telephone company's ability to respond to Federal Government requests for proposals (RFP's) in a timely manner.

The Army, the DOD, and the other FEA's represented by the Regulatory Law Office stress the deleterious effects that the exercise of such commission approval authority has on all telecommunications carriers regulated by any particular commission. The overall effect of this provision is therefore to burden the entire regulated sector of the telecommunications industry in the various states with an onerous requirement that does not apply to the unregulated sector. This relative disadvantage ultimately flows through to the detriment of the users of these carriers' monopoly services.

Under the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 10 U.S.C. §§ 2301-2305, 41 U.S.C. § 403, the Federal Government is obligated to pursue full and open competition through the use of competitive procedures in the award of contracts. Pursuant to this obligation, the FEA's have adopted a systematic policy of acquiring their telecommunications services on a competitively bid basis insofar as possible. This policy makes sense from a business as well as legal standpoint. It ensures that the FEA's receive the best possible services for the lowest possible cost.

The primary reason for commission's regulatory control over telecommunications carriers is to restrain the ability of those carriers to exercise the monopoly pricing power that they possess as a result of their exclusive franchises to offer a vital public service. Regulation substitutes for competition by attempting to establish rates that are similar to those that would occur were the utility services in question truly competitive.

Competitive bidding renders regulatory control unnecessary. The Federal Acquisition Regulations require that requests for proposals be issued publicly and be available to all potential bidders. They impose detailed bid evaluation and vendor selection procedures designed to ensure that the award goes to the supplier offering the best possible service at the lowest possible cost. Where these procedures are applied, the Federal Government does not need the protection that commission regulation affords against the abuse of monopoly power by the telephone companies. Viable competitive bidding is prima facie evidence that such monopoly power does not exist.

More importantly, regulatory control can be destructive to the competitive bidding process. The procurement procedures employed by the FEA's require that the vendor specify the facilities and services to be provided in response to the government's defined requirements, the duration of the service commitment, a management plan, and a firm price offer. That price offer may include prices for the sale of specific equipment, leases of dedicated facilities, or charges for the use of facilities that are also employed to serve other customers of the same vendor. If there are continuing charges, the FEA's require that the vendor commit to such charges on a firm basis for a specified period of time. Any escalation in these prices during the term of the commitment must be spelled out in specific terms according to clearly defined formulas based on trend factors that are external to both the purchaser and the vendor. These procurements vary widely with respect to the types of facilities and services obtained, the duration of the commitment, the ownership and the operation of the service, and the payment mechanism. Nevertheless, they have one common characteristic, and this is that *they all must result in binding contracts.*

If regulation threatens to modify or reverse the prices, terms, or conditions of the bid from a regulated carrier, then that carrier is unable to guarantee that its offer can be converted into a binding contract. Its bid is subject to the possibility of adverse regulatory action, including disapproval of the terms and prices. Unless this impediment is removed, then the bids of regulated carriers could be regarded as not fully satisfying the FEA's commitment requirement. Accordingly, the ability of those carriers to participate in FEA procurements would be jeopardized.

In order for the telephone company to be on an equal footing with its competitors, virtually all of the conventional regulatory controls over competitively bid services must be relaxed. The carrier should not be required to disclose publicly the rates, conditions or costing support for its bid except in generalized terms. Such disclosures would put the carrier at a severe disadvantage relative to unregulated competitors, none of whom would be subject to these requirements.

Most important of all, however, the carrier must be able to commit to its bid. This means that the carrier must

be able to assure the Government agency that its bid is not subject to regulatory review, revision or rejection. This assurance in turn requires a commission to commit to total regulatory forbearance with regard to the rates and services procured under competitive bidding procedures.

To be sure, a commission has a legitimate concern with a carrier's incentive to support unprofitable competitively bid services with contributions from monopoly services. As part of its objective of protecting monopoly ratepayers, a commission must ensure that those customers are not being taxed to support a local exchange telephone company's competitive contract service.

In its October 12, 1989, Decision 89-10-031 in Phase II of its investigation into Alternative Regulatory Frameworks for Local Exchange Carriers, I.87-11-033, the California Public Utilities Commission addressed this very problem. It separated the carriers' (Pacific Bell and General Telephone of California) services into three categories: Category I, Monopoly Services; Category II, Discretionary Services; and Category III, Enhanced and Fully Competitive Services. The California commission recognized the strong incentive for the carriers to subsidize Category III services with revenues generated from Categories I and II services. It therefore required that these competitive services be placed "below the line" and that the costs of these services be subtracted from the revenue requirement applicable to the regulated Category I and II services covered by the proposed sharing mechanism.

As noted earlier, services covered by contracts awarded pursuant to competitive bidding procurement procedures are prima facie competitive. It would be appropriate for the California commission (and other commissions) to categorize these services as Category III services for below-the-line treatment. In this manner both the revenues and costs of these services would be excluded from the calculation of the rates and earnings associated with the less competitive services that still require careful regulatory scrutiny.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Military Rules of Evidence Update

Character Evidence of the Accused

M.R.E. 404(a) permits the defense to offer evidence of *pertinent* character traits of the accused on the issue of guilt or innocence. Good military character evidence is admissible if there is a nexus, however strained or slight, between the crime and the military. *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989). The commission of an alleged crime on post and a crime's deleterious effect on a military family could provide the nexus that would allow a "good soldier defense." *United States v. Hurst*, 29 M.J. 477 (C.M.A. 1990).

Using Written Statements to Prove Character

In a significant departure from the Federal Rules of Evidence, M.R.E. 405(c) permits affidavits and written statements to be used in proving the character of the accused. Matters from one's personnel files, to include efficiency reports, may be used. *See, e.g., United States v. Hurst*, 29 M.J. 477 (C.M.A. 1990). Counsel must be wary, however, of material within these documents that may be otherwise objectionable and subject to redaction upon objection.

Uncharged Misconduct

Before analyzing the purpose for which uncharged misconduct is being offered, the prosecutor must show the uncharged misconduct actually occurred. The misconduct no longer needs to be proven by "clear and convincing" evidence. Admission is possible if the military judge concludes the factfinder could reasonably find by a preponderance of the evidence that the other misconduct occurred, even if the judge personally would have not made such a finding. *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989).

Testimony by the accused can open the door to otherwise inadmissible uncharged misconduct. For example, a claim of never having used drugs may be rebutted with contradictory, otherwise inadmissible, evidence of previous drug use. *United States v. Trimper*, 28 M.J. 460 (C.M.A.), *cert. denied*, ____ U.S. ____ (1989). However, an accused's comment not amounting to an unequivocal claim of a particular character trait may not be rebutted with specific instances of misconduct. In *United States v. Collier*, 29 M.J. 3655 (C.M.A. 1990), the accused's claim that he would have followed the order at issue if he had heard the order did not amount to a claim of a character trait that could be rebutted.

Uncharged misconduct may be used to show one's motive for committing an alleged crime. Motive is a state of mind which stimulates one to act. Where the accused denies sexual misconduct with his young stepchild, possession of materials detailing sexual exploitation of and incestuous relations with young girls may be admissible to show the accused's motive. By providing a motive, such evidence could also corroborate the victim's testimony. *United States v. Rhea*, 29 M.J. 991 (A.F.C.M.R. 1990).

Polygraph

Polygraph evidence is neither per se admissible nor inadmissible in courts-martial. The proponent must establish that the polygraph evidence is relevant under M.R.E.s 401 and 402, that the evidence is helpful to the factfinder pursuant to M.R.E. 702, and that the probative value of the evidence is not substantially outweighed by its unfair prejudicial effect. *United States v. McKinnie*, 29 M.J. 825 (A.C.M.R. 1989).

Trauma Syndrome Evidence

Expert testimony limited to explaining typical behavior patterns of traumatized victims may assist court members in resolving facts in issue and, pursuant to M.R.E. 702, may be admissible at trial. Mere conclusions by any witness that another witness is telling the truth are generally not helpful or admissible. However, the fact that trauma syndrome evidence may tend to go to the ultimate issue of the victim's truthfulness does not make it inadmissible. M.R.E. 704; *United States v. Palmer*, 29 M.J. 929 (A.F.C.M.R. 1989). MAJ Warner.

Who Must Read Article 31(b) Warnings: COMA Decides *Loukas*

Article 31 of the Uniform Code of Military Justice, in pertinent part, provides:

> (b) *No person subject to this chapter* may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statements made by him may be used against him in a trial by court-martial.[1]

A literal application of article 31 would require all soldiers, regardless of rank or duty position, to read article 31(b) warnings prior to questioning any soldier suspected or accused of an offense. The Court of Military Appeals, however, has rejected such a literal application of the statute.[2] Instead, it has established several different criteria to limit the number of military personnel who must read rights warnings.[3] This note discusses *United States v. Loukas*,[4] the court's most recent refinement of its analysis of this issue.

Background

In *United States v. Duga*[5] the court interpreted article 31(b)'s purpose and legislative history to require rights warnings "only in situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry."[6] This policy was implemented by a two-part test that examined the following:

> [W]hether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. Unless both prerequisites are met, Article 31(b) does not apply.[7]

The court further limited the reach of article 31 in *United States v. Loukas*. There it stated that article 31 requires warnings "only when questioning is done during an *official law enforcement investigation or disciplinary inquiry*."[8] In essence, *Loukas* more narrowly defines the "official" purpose required by the first part of the *Duga* test. The court used military doctors to illustrate

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[1] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982) [hereinafter UCMJ] (emphasis added).

[2] *E.g.*, United States v. Duga, 10 M.J. 206 (C.M.A. 1981); United States v. Loukas, 29 M.J. 385 (C.M.A. 1990).

[3] Supervielle, *Article 31(b): Who Should Be Required To Give Warnings*, 123 Mil. L. Rev. 151 (1989).

[4] United States v. Loukas, 29 M.J. 385 (C.M.A. 1990).

[5] United States v. Duga, 10 M.J. 206 (C.M.A. 1981).

[6] *Id.* at 210.

[7] *Id.* (citation omitted).

[8] *Loukas*, 29 M.J. at 387 (emphasis added).

this latest definition. A military doctor asking medical diagnostic questions of a military subordinate is asking official questions. So long as the doctor is not performing "an investigative or disciplinary function or engaged in perfecting a criminal case," however, the doctor is not required to read article 31 warnings.[9] Rights warnings are not required under these circumstances because the doctor's questioning is "official, but not law enforcement or disciplinary."[10]

Facts

Loukas was the load master of a C-130 aircraft on a mission in support of drug suppression efforts in South America. The aircraft departed Panama and was in flight for four hours when the assistant crew chief, Airman First Class Toranto, stepped into the cargo section and observed Loukas acting in an irrational manner. Loukas was apparently hallucinating when he asked Toranto, "Do you see him?" and, "Do you see her?" because there was no one else in the cargo section. Loukas then handed his .38 calibre pistol to the assistant crew chief. Toranto took the pistol and reported the incident to SSgt Dryer, the crew chief. SSgt Dryer went to the cargo section and confronted Loukas. He observed Loukas acting nervous, perspiring profusely, gesturing, and hallucinating. Dryer did not advise Loukas of his article 31 rights, but asked Loukas if he had taken drugs. Ultimately Loukas confirmed Dryer's suspicions by admitting to using cocaine the night before the flight. His statement was used against him at his court-martial.

A panel of the Air Force Court of Military Review[11] and the court later sitting en banc[12] decided that SSgt Dryer should have warned Loukas of his article 31 rights before questioning him about drug use. Furthermore, because the accused was disarmed and posed no threat to the aircraft when he was questioned, the courts decided that the "public safety exception"[13] to rights warnings could not be applied to this case. The findings of guilty and sentence were set aside and a rehearing was authorized. The Court of Military Appeals was asked to decide whether the Air Force Court erred by failing to apply the public safety exception.[14]

Holding and Analysis

The Court of Military Appeals decided that Loukas's statement was not barred by the fifth amendment or article 31.[15] Therefore, the Air Force court was not required to apply the "public safety exception" and did not err by refusing to do so.[16] The court concluded, however, that the Air Force courts did err as a matter of law when, applying *Duga*, they found that SSgt Dryer was "officially" questioning Loukas. The court announced that "the crew chief's inquiry was not a *law enforcement or disciplinary* investigation which is also required before Article 31(b) becomes applicable."[17]

In *Duga* the court had required rights warnings only when a questioner was acting in an "official capacity." In *Loukas* the court explained that warnings are required "only when questioning is done during an official law-enforcement investigation or disciplinary inquiry."[18] The Code does not require warnings prior to questioning "limited to that required to fulfill the questioners operational responsibilities," at least so long as there is no design to evade constitutional or codal rights.[19]

The Court of Military Appeals acknowledged that previously it had "implicitly held that a superior in the immediate chain of command of the suspect subordinate will normally be presumed to be acting in a command disciplinary function."[20] Therefore, personnel in these positions normally will be required to read article 31 warnings. The court went on to say, however, that "this presumption is not so broad or inflexible as to preclude a limited exception where clearly justified."[21] An aircraft crew chief's in-flight questioning of a suspected drug user provides one such example.

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[9] *Id.* at 389.

[10] *Id.*

[11] United States v. Loukas, 27 M.J. 788 (A.F.C.M.R. 1988).

[12] United States v. Loukas, 28 M.J. 620 (A.F.C.M.R. 1989)(en banc).

[13] The public safety exception to *Miranda* warnings was created in United States v. Quarles, 467 U.S. 469 (1984).

[14] *Loukas*, 29 M.J. at 386.

[15] *Id.*

[16] The court noted that the public safety exception applies only to *Miranda* warnings. "Whether a similar exception to Article 31 exists for military superiors acting in a command disciplinary function when questioning a suspect who is not in custody is an issue beyond the facts of this case." *Id.* at 389.

[17] *Id.* at 387 (emphasis in original).

[18] *Id.*

[19] *Id.* at 389. Judge Cox, who concurred entirely in the opinion of the court, amplified this point. "[T]he focus of the statute is *precisely* on the nature and purpose of the questioning, not the happenstance position of the questioner." Article 31 warnings were not required in this case because "the last thing in their minds [was] the possibility of criminal prosecution somewhere down the line." *Id.* at 390.

[20] *Id.* at 389 n.*.

[21] *Id.*

Conclusion

Judge advocates frequently are asked to decide who must read article 31(b) warnings. *Loukas* helps guide that decision by further defining the analytical framework established in *Duga*. It clarifies the distinction between "official" operational questioning, which need not be preceded by article 31 warnings, and official law-enforcement or disciplinary questioning, which must be preceded by warnings. The distinction should be understood by all military attorneys. MAJ Gerstenlauer.

Multiple Requests, Profit Motive, and Entrapment

In *United States v. Cortes*[22] the Army Court of Military Review considered whether an accused charged with distribution of cocaine[23] was entitled to the defense of entrapment. In deciding this issue, the court addressed the effect of multiple requests by a government agent of the accused to sell him drugs and the accused's profit motive for completing the sale upon the application of the defense.

Military law recognizes the subjective entrapment defense.[24] The defense has three elements: 1) the accused's criminal act is established beyond a reasonable doubt; 2) the act is the product of government inducement; and 3) the accused was not predisposed to commit the offense.[25] Entrapment is thus constituted "when the criminal design or suggestion to commit an offense originated in the Government and the accused had no predisposition to commit the offense."[26]

The accused in *Cortes* contended that he was entrapped because of the government agent's repeated efforts to entice him into selling cocaine. The accused testified that the agent approached him about ten times during a two-month period, requesting that he bring cocaine back from New York City to Fort Drum.[27] The accused initially put him off, saying variously that he "wasn't sure" he could obtain cocaine and that he had "retired" from the business of selling drugs.[28] The accused claimed he eventually sold cocaine to the agent because of job pressures, family problems (including his pending divorce), and financial difficulties.[29]

The military's appellate courts have long held that whether entrapment exists in a particular case is a factual question.[30] The defense is commonly raised when a government agent makes multiple requests of an accused to commit a crime,[31] as happened in *Cortes*. Multiple requests, however, will not necessarily constitute a sufficient inducement for entrapment. In *United States v. Sermons*,[32] for example, the Court of Military Appeals found that entrapment was not raised even though the government agent approached the accused on several occasions trying to purchase drugs.[33] The court explained that merely because the agent repeatedly sought out the accused before the sale was accomplished was not dispositive, as a lack of money prevented the accused from consummating the transaction at an earlier time.[34] No instruction on entrapment was therefore required,

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[22] 29 M.J. 946 (A.C.M.R. 1990).

[23] A violation of UCMJ art. 112a.

[24] For a comparison of the subjective and objective formulations of the entrapment defense, see generally TJAGSA Practice Note, *The Evolving Entrapment Defense*, The Army Lawyer, Jan. 1989, at 40. For a recent discussion of the subjective entrapment defense, see United States v. Dayton, 29 M.J. 6 (C.M.A. 1989).

[25] United States v. Vanzandt, 14 M.J. 332, 343 (C.M.A. 1982); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(g) [hereinafter MCM, 1984, and R.C.M., respectively]. Although the courts sometime continue to refer to entrapment as being a "'confession and avoidance' type of defense," *e.g.*, United States v. McGraw, 29 M.J. 1055, 1057 (A.C.M.R. 1990), it remains unsettled whether an accused seeking to use entrapment is required to admit committing the crime, as a factual matter. *See generally* United States v. Sermons, 14 M.J. 350, 352 n.* (C.M.A. 1982).

[26] R.C.M. 916(g).

[27] *Cortes*, 29 M.J. at 948.

[28] *Id.*

[29] *Id.*

[30] In United States v. Meyers, 21 M.J. 1007 (A.C.M.R. 1986), the Army Court of Military Review wrote in this regard:

> Those factors that we would identify as particularly significant in determining whether or not an accused was predisposed to commit an offense include: (1) whether the government made the initial suggestion of criminal activity; (2) whether the accused engaged in the activity for profit; (3) whether the accused was reluctant to engage in the activity and the degree of reluctance shown; and (4) the nature of and the circumstances surrounding the government's inducement, if any. We decline to treat any one factor as on its face being more important than any other. The weight to be given each factor, under the totality of the circumstances, in resolving the issue of predisposition is best left to the fact finder in each individual case.

Id. at 1014 (citation omitted); *see also* United States v. Johnson, 17 M.J. 1056, 1058 (A.F.C.M.R. 1983).

[31] *See, e.g., Meyers*, 21 M.J. at 1014 (government agent initially suggested to accused that he distribute drugs, and then persistently attempted to cause the accused to distribute drugs for about three weeks). Conversely, the courts have been reluctant to recognize entrapment when the accused responds to a single request to engage in illegal activity. *E.g., Dayton*, 29 M.J. 6 (C.M.A. 1989); United States v. Rollins, 28 M.J. 803 (A.C.M.R. 1989).

[32] 14 M.J. 350 (C.M.A. 1982).

[33] *Id.* at 352.

[34] *Id.*

because the evidence did not show that government instigated criminal activity by an otherwise law-abiding citizen.[35]

The court in *Cortes* likewise concluded that the accused was not entitled to the entrapment defense despite the government agent's repeated attempts to purchase drugs from him. The court found that the accused was an experienced and mature noncommissioned officer who out-ranked the government agent.[36] The court also observed that the accused and the agent were mere acquaintances, who neither socialized nor worked together. Moreover, the accused bragged about the quality of the cocaine during the transaction[37] and assured the agent that he could continue to supply him with cocaine on a regular basis. The accused, in fact, tried to recruit the agent to sell drugs for him in exchange for $400 per week. Based upon the totality of these facts, the court concluded in *Cortes* that the accused was not entitled to the entrapment defense despite the agent's repeated efforts to purchase cocaine from him.

Another factor in *Cortes* arguing against entrapment was the accused's profit motive for engaging in the transaction.[38] Under earlier decisional law, such a profit motive would have foreclosed raising the defense of entrapment.[39] The courts formerly reasoned that an accused in these circumstances committed the charged offense due to an overriding desire to make money, and not because of any inducement on the part of the government.[40] Entrapment was thus routinely rejected, as a matter of law, when an accused sold drugs for a profit absent police conduct violating fundamental fairness.[41]

In the 1986 case of *United States v. Meyers*[42] the Army Court of Military Review held that the accused's profit motive did not necessarily prevent him from raising the defense of entrapment.[43] In *Meyers* the accused asked a government informant for help in finding a second job.[44] The informant responded with the suggestion that the accused sell illegal drugs.[45] Aware of the accused's pressing financial difficulties, the informant met with him on several occasions during each of the next three weeks.[46] The informant repeatedly told the accused that he could not find a legitimate job for him, but that a good way to make money was to deal in hashish.[47] The accused eventually agreed to sell hashish after this extensive prodding.[48] Based on these circumstances, the court concluded "that the police agent had thus preyed on the accused's need for money; and, instead of foreclosing the defense, the accused's profit motive was merely a factor for consideration when determining the element of predisposition."[49]

More recently, the Court of Military Appeals, in *United States v. Eckhoff*,[50] agreed that profit motive does not necessarily bar an entrapment defense.[51] Although *Eckhoff* has authoritatively disposed of the profit-motive-foreclosure rule under military law, this case, curiously, is not cited by the court in *Cortes*. Nevertheless, the court

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[35] *Id.*; *see also* United States v. Clark, 28 M.J. 401 (C.M.A. 1989) (accused's hesitancy about continuing as a drug dealer did not raise entrapment, as this was not the result of a lack of predisposition but rather was because of a fear of being apprehended).

[36] *Cortes*, 29 M.J. at 948.

[37] The accused told the agent "taste it, it's real good—it's the best in the city." *Id.*

[38] The accused told the agent that he anticipated making at least $500 on the transaction. *Id.*

[39] *See, e.g.*, United States v. Herbert, 1 M.J. 84 (C.M.A. 1985); United States v. Beltran, 17 M.J. 617 (N.M.C.M.R. 1983); *see also* United States v. Schultz, 7 M.J. 524, 525 (A.C.M.R. 1979); United States v. Young, 2 M.J. 472, 477 (A.C.M.R. 1975).

[40] *Herbert*, 1 M.J. at 85-86; *accord* Russell, 411 U.S. 423, 432 (1973).

[41] *Herbert*, 1 M.J. at 85-86.

[42] 21 M.J. 1007 (A.C.M.R. 1986).

[43] *Id.* at 1012-13.

[44] *Id.* at 1009.

[45] *Id.* The informant concluded that the accused "would not agree to traffic in drugs unless [he] 'worked on him.'" *Id.*

[46] *Id.* at 1009, 1014.

[47] *Id.*

[48] *Id.* at 1009-10, 1014.

[49] TJAGSA Practice Note, *The Evolving Entrapment Defense*, The Army Lawyer, Jan. 1989, at 40, 43.

[50] 27 M.J. 142 (C.M.A. 1988).

[51] *Id.* at 144. This conclusion is consistent with Supreme Court precedent. *See* United States v. Matthews, 108 S. Ct. 883, 886 (1988); United States v. Fadel, 844 F.2d 1425, 1433 (10th Cir. 1988); United States v. Perez-Leon, 757 F.2d 866, 871 (7th Cir. 1985); United States v. So, 755 F.2d 1350 (9th Cir. 1985); *cf.* United States v. King, 803 F.2d 387 (8th Cir. 1986).

in *Cortes* correctly recognized that although the accused's substantial profit motive was a factor indicating that he was predisposed to sell cocaine and thus was not entrapped, this profit motive did not automatically prevent him from claiming the entrapment defense.[52] MAJ Milhizer.

Rioting as an Offense Under Military Law

Causing or participating in a riot is a distinct offense under military law.[53] As the recent case of *United States v. Fisher*[54] indicates, a soldier's conduct will not constitute rioting, no matter how tumultuous or destructive, unless it terrorized the public in general.

The misconduct at issue in *Fisher* grew out of an earlier altercation between soldiers of two different units—an artillery battalion and an engineer battalion—during which one soldier suffered a dislocated elbow.[55] Two days later, several carloads of artillery soldiers, apparently led by the accused, drove to the parking lot of the engineer battalion seeking to confront the soldiers of that unit. The artillery soldiers had armed themselves with poles, bats, broom sticks, and crow bars. The engineer battalion staff duty officer intervened and prevented a physical confrontation between the soldiers from the two units. The accused then withdrew from the building and returned to the other artillery soldiers, urging "if they [the soldiers from the engineer battalion] are not going to come out we'll get their cars."[56] The accused and the others then began hitting the vehicles parked in the lot with the implements they had brought, causing over $8,000.00 in damage. During this incident, the artillery soldiers had several contacts with a few soldiers from a chemical company who shared the parking lot. The appellate court noted, however, that the record did "not disclose that other elements of the military community in close proximity to that event were adversely affected in any manner."[57]

The accused in *Fisher* was convicted, *inter alia*, of causing or participating in a riot in violation of article 116. The elements of this offense, as set forth in the Manual for Courts-Martial,[58] include the requirement that the accused's "acts terrorize[] the public in general in that they caused or were intended to cause public alarm or terror."[59] The Manual explains that "[t]he gravamen of the offense of riot is terrorization of the public."[60] As the Court of Military Appeals noted some twenty-four years earlier, the crime of riot under military law requires "terrorization of the public in general—'the idea of a lawless mob accomplishing or bent on accomplishing some object in such violent and turbulent manner as to create public alarm or consternation or as terrifies or is calculated to terrify people.'"[61]

The court in *Fisher* applied this precedent and concluded that the accused's misconduct, although constituting a destructive and tumultuous breach of the peace, did not amount to rioting under military law.[62] The court

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[52] Quite to the contrary, a particularly substantial profit motive may, in some circumstances, indicate that the accused was indeed entrapped. For example, a soldier who is not predisposed to distribute marijuana might be induced to sell a "joint" to an undercover agent in exchange for a $1000 profit.

[53] A violation of UCMJ art. 116.

[54] ACMR 8901397 (A.C.M.R. 30 Mar. 1990).

[55] *Id.*, slip op. at 2.

[56] *Id.*

[57] *Id.*

[58] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[59] *Id.*, Part IV, para. 41b(1)(d). The offense of causing or participating in a riot has four elements:

> (a) That the accused was a member of an assembly of three or more persons;
>
> (b) That the accused and at least two other members of this group mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose;
>
> (c) That the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and
>
> (d) That these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

Id.

[60] *Id.*, Part IV, para. 41c(1). "Public" and "community" is defined as "includ[ing] a military organization, post, camp, ship, aircraft, or station." *Id.*, Part IV, para. 41c(3).

[61] United States v. Metcalf, 36 C.M.R. 309, 316 (C.M.A. 1966) (quoting People v. Edelson, 169 Misc. 386, 7 N.Y.2d 323 (1938), International Wire Works v. Hanover Fire Insurance Co., 230 Wis. 72, 283 N.W. 292 (1939)).

[62] *Fisher*, ACMR 8901397, slip op. at 3.

noted that the incident involved less than thirty soldiers from the three units and was of a brief duration. Moreover, the evidence failed to establish that the "public or community as defined by the Manual was likely affected or terrorized by the tumultuous affair."[63] Accordingly, the accused's conviction for causing or participating in a riot was reversed.

The court nonetheless affirmed the accused's conviction for the lesser included offense of breach of the peace.[64] Terrorization of the public in general is not required for this less serious crime;[65] all that is necessary is that the accused cause "an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature."[66] Finding that the accused's misconduct clearly satisfied the elements of this offense (and that the court-martial found the accused guilty of these elements as a matter of law when it found the accused guilty of rioting), the court affirmed the accused's conviction of breach of the peace.

The military's appellate courts have had few opportunities to consider the substantive requirements for rioting under the UCMJ. Accordingly, counsel having cases involving this crime should become familiar with *Fisher* and the guidance it provides. MAJ Milhizer.

Proving Lack of Consent for Intra-Family Sex Crimes

The crime of rape[67] is constituted when an accused has sexual intercourse with a female not his wife, perpetrated by force and without her consent.[68] As the recent case of *United States v. Palmer*[69] illustrates, the "lack of consent" and "force" requirements for rape and other nonconsensual sexual offenses[70] are viewed in a qualitatively different light when the accused is the natural parent of the child victim, or stands *in loco parentis*[71] to the victim.

Military law has long recognized that some children are so young and immature that they are incapable of consenting to sexual intercourse under any circumstances.[72] Other females, who have not reached the age of sixteen, may nonetheless consent to sexual intercourse; in such a case, the accused would be guilty of the less serious offense of carnal knowledge.[73]

Whether a particular female under sixteen, who is capable of consenting to sexual intercourse, actually

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[63] *Id.*

[64] Also a violation of UCMJ art. 116; *see* MCM, 1984, Part IV, para. 41d(1)(a) (breach of the peace is a lesser included offense of riot). Breach of the peace has two elements:

> (a) That the accused caused or participated in a certain act of a violent or turbulent nature; and
>
> (b) That the peace was thereby unlawfully disturbed.

MCM, 1984, Part IV, para. 41b(2).

[65] The difference in the maximum punishment for these two offenses is substantial. The maximum punishment for riot includes a dishonorable discharge, total forfeitures, and confinement for ten years. *Id.*, Part IV, para. 41e(1). The maximum punishment for breach of the peace includes only confinement six months and two-thirds forfeiture of pay per month for six months. *Id.*, Part IV, para. 41e(2). No discharge is authorized for a breach of the peace. *Id.*

[66] *Id.*, Part IV, para. 41c(2). The Manual explains further that

> [t]he acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. Engaging in an affray and unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker. A speaker may also be guilty of causing a breach of the peace if the speaker uses language which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results. The fact that the words are true or used under provocation is no defense, nor is tumultuous conduct excusable because incited by others.

Id.

[67] A violation of UCMJ art. 120.

[68] MCM, 1984, Part IV, para. 45b(1).

[69] 29 M.J. 929 (A.F.C.M.R. 1989).

[70] For example, forcible sodomy and indecent assault, as proscribed by UCMJ arts. 125 and 134, respectively. *See* MCM, 1984, Part IV, paras. 51 (sodomy) and 63 (indecent assault). For a recent discussion of forcible sodomy by an accused who is an authority figure to the child victim, see United States v. Edens, 29 M.J. 755 (A.C.M.R. 1989).

[71] "*In loco parentis*" is defined as "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." H. Black, Black's Law Dictionary 896 (4th ed. rev. 1968).

[72] *See* United States v. Thompson, 3 M.J. 168 (C.M.A. 1977); United States v. Aleman, 2 C.M.R. 269 (A.B.R. 1951); *see also* United States v. Huff, 4 M.J. 816 (A.C.M.R. 1978) (because the victim was under sixteen years of age, proof of age is proof of lack of consent allowing fresh complaint evidence).

[73] A violation of UCMJ art. 120(b); *see generally* United States v. Cameron, 34 C.M.R. 913 (A.F.B.R. 1964).

consents or offers sufficient resistance in a given case is a factual question. The courts have viewed resistance as being a relative term, which must be considered in accordance with the specific circumstances of each case.[74]

As a general rule, a competent victim must manifest more than a mere lack of acquiescence or consent may be inferred by the fact finder.[75] As the Manual explains:

> If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the female is unable to resist because of the lack of mental or physical faculties.[76]

In other words, although resistance is not an element of rape, the failure of the victim to resist reasonably may indicate that she actually consented or that force was not employed.[77]

When the accused is the father of or a father figure to the child victim, however, the Air Force Court of Military Review has consistently evaluated the question of consent and the reasonableness of the victims' physical resistance, or lack of it, from a wholly different perspective. In *United States v. DeJonge*,[78] decided in 1983, the accused was convicted of raping his natural daughter, beginning when she was eleven-years old and continuing on a regular basis until well beyond her seventeenth birthday.[79] The evidence reflected that the victim told her father on several occasions that "it was wrong" and she "didn't want to do it anymore," but relented because she feared him.[80]

The accused in *DeJonge* contended on appeal that the evidence was insufficient show that his daughter had been forced to have sexual intercourse with him. The court of review strongly rejected this argument, finding that there was "constructive force where the sexual intercourse is accomplished under the compulsion of long continued parental duress."[81] The court concluded, "in a rape of a daughter by her father it is not necessary to show that she physically resisted. It is sufficient that she submitted under compulsion of parental command."[82]

In *United States v. Torres*,[83] decided early last year, the accused was convicted of repeatedly raping his thirteen-year-old foster child during a two-to three-month period.[84] The victim had been placed in foster care about a year earlier because she had been sexually and physically abused by her natural father.[85] The accused testified at trial that the victim was a willing sexual partner, that she eagerly participated in sexual foreplay, that she moaned during the encounters, and that she indicated to him that she "liked it."[86] The victim agreed that the accused never "forced" her to have intercourse with him and that he was always "gentle" with her. The victim denied participating in any sexual foreplay, however, and explained that she moaned because of pain rather than pleasure.[87]

The court in *Torres*, as in *DeJonge*, recognized that intrafamial sexual abuse must be evaluated by a different standard than other sexual offenses. The court wrote:

> Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse. The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, create a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.[88]

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[74] Resistance, when used in this context, refers to the victim's resistance to the act of sexual intercourse, and thus is related directly to the requirement for rape that the intercourse be by force. The force required for rape can be actual or constructive. United States v. Bradley, 28 M.J. 197 (C.M.A. 1989); United States v. Hicks, 24 M.J. 3 (C.M.A. 1987).

[75] United States v. Henderson, 15 C.M.R. 268 (C.M.A. 1954); *see also* United States v. Moore, 15 M.J. 354 (C.M.A. 1983).

[76] MCM, 1984, Part IV, para. 45c(1)(b); *see* United States v. Booker, 25 M.J. 114 (C.M.A. 1987); United States v. Robertson, 33 C.M.R. 828 (A.F.B.R. 1963) (resistance is not required when the victim is incompetent, unconscious, or sleeping).

[77] *See* United States v. Steward, 18 M.J. 506, 509-13 (A.F.C.M.R. 1984) (Miller, J., concurring).

[78] 16 M.J. 974 (A.F.C.M.R. 1983), *pet. denied*, 18 M.J. 92 (C.M.A. 1984).

[79] *Id.* at 976.

[80] On one occasion the accused threatened to "beat the hell out" of his daughter. *Id.*

[81] *Id.*

[82] *Id.*

[83] 27 M.J. 867 (A.F.C.M.R. 1989).

[84] *Id.* at 868.

[85] *Id.* at 867-68.

[86] *Id.* at 868.

[87] *Id.* at 868-69.

[88] *Id.* at 869 (quoting State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673, 681 (1987)).

The court found further that the victim in *Torres* was especially vulnerable because of her recent placement in numerous foster homes, which was the result of her natural father physically and sexually abusing her. The court concluded that when a child victim submits to sexual activity "'through the coercion of one whom she is accustomed to obey, such as a parent or one standing *in loco parentis*,' the law is satisfied with less than a showing of the utmost physical resistance of which she is capable."[89]

The latest case to address these issues is *United States v. Palmer*.[90] The accused in *Palmer* was the stepfather of the twelve-year-old victim.[91] During a period spanning several months, the accused had numerous sexual encounters with the victim, leading to charges of sodomy and indecent assault.[92] On at least two occasions, the accused had sexual intercourse with the victim, which served as the basis for a rape charge.[93] The victim never physically resisted the accused and said "no" to his advances only once. During the second episode of sexual intercourse, the victim feigned sleep because she was frightened.[94] Because of her continuing fear of the accused, the victim otherwise gave equivocal responses to the accused's sexual advances. Most of the charged offenses occurred while the victim was alone in the house with the accused, who was apparently a physically imposing person.[95]

The accused in *Palmer*, as did the accuseds in *DeJonge* and *Torres*, contended on appeal that the victim consented to all of the charged sexual activity, including intercourse. The court in *Palmer* acknowledged, in this regard, that the accused never employed physical force against the victim.[96] The court nonetheless found that the accused's sexual intercourse with the victim was accomplished by force and without her consent, and thus affirmed the accused's conviction for rape.

Citing both *DeJonge* and *Torres*, the court reiterated that the constructive force sufficient for rape can be subtle and psychological. Given the dynamics of a father-daughter relationship—and the special vulnerability of the child and her dependance upon her father figure—the court had no trouble in finding that the victim in *Palmer* did not consent to sexual intercourse with the accused, despite the absence of any overt physical resistance or repeated protestations on her part.

Palmer also teaches an important practical lesson to trial practitioners concerning instructions. Just as the defense counsel can request a favorable instruction that consent can be inferred when the victim fails to make her lack of consent reasonably manifest,[97] the trial counsel can request that the military judge instruct that physical resistance is not required in the case of parental rape. The court of review approved the specially tailored instructions given by the military judge in *Palmer*, which advised in part that:

> Consent to sexual intercourse if induced by fear, fright, or coercion, is equivalent to physical force. Accordingly, in the rape of a stepdaughter by her father, it is not necessary to show that she physically resisted. It is sufficient that she submitted under compulsion of a parental command. Likewise, the acquiescence of a child of such tender years that she is incapable of understanding the nature of the act is not consent.[98]

The Manual provides generally that the military judge should give specially tailored instructions, as long as they comport with the law, fit the circumstances of the case, fairly and adequately cover the issues raised by the evidence, and address matters not covered adequately elsewhere in the instructions.[99] As this note makes evident, *Palmer*, *Torres*, and *DeJonge* provide a veritable

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[89] *Torres*, 27 M.J. at 869-70 (quoting State v. Risen, 192 Or. 557, 235 P.2d 764, 766 (1951) (citations omitted)).

[90] 29 M.J. 929 (A.F.C.M.R. 1989).

[91] *Palmer*, 29 M.J. at 930-31. The accused was described as being the primary disciplinarian in the family, and he spanked the victim and her brother often. *Id.* at 934.

[92] *Id.* at 931-33.

[93] *Id.* at 931-32. Although two separate incidents of sexual intercourse are described in the reported facts, the accused was apparently charged with only a single specification of rape.

[94] *Id.* at 932.

[95] The accused testified at an earlier session of trial that "he was so large" the police had to remove his handcuffs to fit him into the rear seat of a police car. *Id.*

[96] *Id.*

[97] *See* MCM, 1984, Part IV, para. 45c(1)(b); Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-89*b* (15 Feb. 1989).

[98] Quoted in *Palmer*, 29 M.J. at 936.

[99] *See generally* R.C.M. 920(a) and discussion (military judge should tailor his instruction to fit the circumstances of the case and fairly and adequately cover the issues raised by the evidence); Warren & Jewell, *Instructions and Advocacy*, 126 Mil. L. Rev. 147 (1990).

gold mine of quotable language that trial counsel can use as the basis for requesting favorable, tailored instructions in intrafamial sex abuse cases. In the appropriate case, such an instruction may be the difference between a conviction and an acquittal. MAJ Milhizer.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Tax Note

Distributions From Individual Retirement Arrangements

One of the factors investors should consider before making contributions to Individual Retirement Arrangements (IRA) is the tax treatment of distributions. Generally, any amount distributed from an IRA must be included in the gross income of the payee.[100] If the IRA was funded by nondeductible contributions, however, only the earnings will be taxable. If the taxpayer has made both deductible and nondeductible IRA contributions, the funds will be lumped together and distributions taxed according to the ratio of deductible to nondeductible funds in the total.[101]

Taxpayers who make IRA contributions should also recognize that Congress imposes a stiff ten percent penalty on money withdrawn from IRA's before age fifty-nine and one-half.[102] Funds taken from nondeductible IRA's before the taxpayer is fifty-nine and one-half will be subject to this additional tax only to the extent of earnings.

Despite these provisions, taxpayers are not entirely foreclosed from withdrawing funds deposited in their IRA's. Taxpayers may directly transfer IRA proceeds from one trustee to another without any tax consequences. Direct transfers may be made at any time and as often as desired.

Taxpayers also have a limited right to withdraw money from their IRA's under the tax-free rollover provision of the code.[103] This provision allows taxpayers to receive and use IRA distributions for a sixty-day period. The amounts withdrawn will not be considered income and are not subject to the additional tax on premature withdrawals so long as the entire proceeds are reinvested in the same or a new IRA within sixty days.

The sixty-day rollover time limit is strictly construed by the IRS. In one case, a taxpayer withdrew funds from an IRA and wrote a check to another IRA trustee fifty days later. The taxpayer's bank refused to honor his check due to a clerical error and the taxpayer was unable to write out a new check until after the sixty-day period had expired. The IRS, claiming it did not have authority to waive the sixty-day period, assessed a tax on the distribution.[104]

Recently, the Internal Revenue Service (IRS) reversed the position taken by one of its auditors and concluded that individuals may borrow money from their IRA's for personal use without tax consequences as long as the funds are redeposited within sixty days.[105] The transaction will not be treated as income to the owner-borrower and is not subject to the penalty for early distribution.

Although this new ruling gives taxpayers increased flexibility, they must be sure to pay back the borrowed sums within sixty days to escape taxable distribution rules. Borrowing from an IRA[106] or using an IRA as security for a loan for a period exceeding sixty days will be treated as a taxable distribution up to the amount borrowed or pledged.[107]

Taxpayers are only entitled to one tax-free rollover each year.[108] The one-year period begins to run with the day of receipt. This limit, however, applies to each IRA account a taxpayer owns.

Another exception to the general rule of taxability of withdrawals arises in the context of a divorce. The

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[100] I.R.C. § 408(d)(1) (West Supp. 1989).

[101] *Id.*

[102] I.R.C. § 72(t) (West Supp. 1989).

[103] I.R.C. § 408(d)(3)(A) (West Supp. 1989).

[104] Priv. Ltr. Rul. 88-24-047 (1988).

[105] Priv. Ltr. Rul. 90-10-007 (Mar. 9, 1990). The IRS also concluded that the amounts that were redeposited were also not subject to the six percent penalty for excess contributions.

[106] I.R.C. § 408(e)(3) (West Supp. 1989).

[107] I.R.C. § 408(d)(4) (West Supp. 1989).

[108] I.R.C. § 408(d)(3)(B) (West Supp. 1989).

transfer of an IRA to a former spouse pursuant to a divorce decree or written instrument is not considered a distribution to either the original owner or the transferee former spouse.[109]

Special rules also apply to distributions from inherited IRA's. The ten percent penalty does not apply to distributions after an IRA owner's death. Money withdrawn from an inherited IRA will, however, be taxed to the beneficiary unless it represents a return of nondeductible contributions.

The IRS limits the ability of IRA beneficiaries to leave the money in an IRA to avoid taxable distribution rules. If the deceased owner was over seventy and one-half years old and subject to the required distribution rules, the beneficiary must continue receiving distributions at the same rate as if the original owner was alive. If the owner was under seventy and one-half and not the spouse of the beneficiary, the beneficiary must withdraw the entire IRA within five years of the death of the owner or begin annual withdrawals based on life expectancy beginning within one year of the death of the owner.

More alternatives are available if the beneficiary is the surviving spouse of the IRA owner. The surviving spouse may take advantage of the tax-free rollover provisions to transfer all of the IRA proceeds into another IRA.[110] The basic distribution rules will then be applicable to the transferred funds.

The stiff ten percent penalty on distributions before age fifty-nine and one-half may be avoided under certain circumstances in addition to divorce and death. The additional tax does not apply if the IRA owner becomes disabled prior to reaching age fifty-nine and one-half. Moreover, the penalty does not apply to a distribution in the form of an annuity payable over the life or life expectancy of the participant.[111] Withdrawals prior to reaching age fifty-nine and one-half will not be penalized as long as the taxpayer makes withdrawals every year in predetermined amounts that are designed to deplete the account over the taxpayer's life expectancy. Although the simplest way to calculate the annual withdrawal is to divide the total balance in an IRA by the taxpayer's life expectancy, the IRS allows several alternative formulas that may generate higher early withdrawals.

Because IRA's are designed to provide a stream of income upon retirement, withdrawals for any other purpose should not be made lightly. Although Congress has placed important tax incentives for keeping funds in the IRA until retirement, taxpayers still have some flexibility to make fund transfers and limited withdrawals without incurring additional taxes. MAJ Ingold.

Estate Planning Notes

Are Life Insurance Proceeds Included in Decedent's Gross Estate?

At a recent legal assistance course, some legal assistance attorneys were unaware of the estate tax consequences of owning life insurance. Because life insurance is usually the most valuable property soldiers own, estate planners must understand how this asset will be treated under federal estate tax law.

Since 1918, the code has had some provision for including life insurance on the life of a decedent in the decedent's gross estate. Life insurance is included in the gross estate if the proceeds are either received by the executor of the decedent's estate or payable to beneficiaries.[112]

The first category includes a broader scope of payments than insurance proceeds paid directly to an executor. It also includes proceeds that are paid for the benefit of an estate, for example to a named trustee under an agreement to satisfy claims made against the estate.

The IRS will apply a fairly straightforward test to determine if life insurance proceeds are includible in the gross estate under the second category. Proceeds will be included if the decedent owned any "incidents of ownership." Although neither the code nor the Treasury regulations contain a specific definition of incidents of ownership, the term is broader than the legal concept of ownership and includes any economic benefit of the policy.[113] Treasury Regulations contain a listing of incidents of ownership, including the right to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it as security for a loan, or to borrow against the cash surrender value, or to select a settlement option.[114] The full amount of the proceeds of the policy will be included even if the decedent was only a joint owner of an incident of ownership.

There are two ways to avoid inclusion of insurance in the gross estate of the insured. The first, and most

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[109]I.R.C. § 408(d)(6) (West Supp. 1989).

[110]I.R.C. § 408(d)(3)(c) (West Supp. 1989).

[111]I.R.C. § 72(t) (West Supp. 1989). *See also* Matter of Kochell, 804 F.2d 84 (7th Cir. 1986).

[112]I.R.C. § 2042 (West Supp. 1989).

[113]Treas. Reg. § 20.2042.1(c)(2).

[114]Treas. Reg. § 20.2042-1(c)(2). *See also* Rhode Island Hospital Trust Co., 355 F.2d 7 (1st Cir. 1966). Rev. Rul. 79-129, 1979-1 CB 306.

practical way, is for the insured to assign and surrender all powers under the policy.

Although transferring a policy is mechanically simple, an insured should carefully consider all of the consequences of giving away a life insurance policy. Because the gift of the policy must be absolute and irrevocable to obtain a tax benefit, clients who are unsure about their ultimate estate planning goals should hesitate before assigning a policy. Clients who procrastinate too long, however, will lose tax benefits because the gross estate includes all life insurance policies surrendered by the decedent within three years of death.[115] The transfer of a life insurance policy having significant built-up cash value may also give rise to a taxable gift. If the cash value of the policy exceeds the annual exclusion amount of $10,000, the insured must pay a gift tax on the transfer.

Some careful thought should also be given to the selection of a new owner for the transferred policy. The insured may defeat the purpose of avoiding estate taxes by giving the policy to a spouse if the spouse is also the beneficiary under the policy. Under federal estate tax law, the transfer to the spouse will not generate gift or estate taxes because of the unlimited marital deduction. The gross estate of the surviving spouse, however, will include the insurance assets and may thereby increase estate tax liability. Transfers of life insurance policies to minors may entail appointment of a guardian.

A second alternative to shield insurance proceeds from estate taxes is to transfer life insurance policies to an irrevocable insurance trust. Although this option is generally outside the means of most soldiers, for some legal assistance clients, such as wealthy retirees, this is the best way to shelter large policies from estate taxes and to protect the interests of beneficiaries. Under a life insurance trust, the insured surrenders control of the policy to an irrevocable trust, managed by an administrator for the benefit of the trust beneficiaries. When the insured dies, the trustee collects the death benefits and distributes the proceeds to the beneficiaries. Irrevocable life insurance trusts are rigorously scrutinized by the IRS and estate tax benefits will not be available if the insured has retained any incident of ownership. Estate tax savings will also be unavailable if the insured dies within three years of transferring the policy to the trustee.

Insureds considering making transfers or gifts of their life insurance policy should read the policy provisions before making the transfer. Many policies require the insured to notify the company prior to making an assignment of the policy. MAJ Ingold.

Property Included in Federal Gross Estate Despite State Court Order

In a decision that could cause major headaches for executors and estate planners, the Tax Court held that the IRS is not necessarily bound by state court orders deciding issues of ownership. In *Estate of Fletcher v. Commissioner*[116] the Tax Court allowed the IRS to include the total value of property in the gross estate of a decedent even though a state court had ruled that the decedent was only a partial owner of the property.

In *Fletcher* a husband and wife died intestate within three hours of each other. The husband owned a Certificate of Deposit (CD) payable on death to his wife, and the couple jointly owned a number of Series E U.S. savings bonds. The husband, who predeceased his wife, included the full value of the savings bonds and the certificate of deposit in his gross estate for federal estate tax purposes. The wife, however, included only one-third of the CD and a fractional share of the savings bonds in her gross estate. The IRS contended that the full value of each asset should have been included in the wife's gross estate.

An Oklahoma District Court ruled that the POD designation was invalid and that therefore the wife and her two adult children were each entitled to one-third share of the CD pursuant to Oklahoma intestate law. The wife's estate urged the tax court to accept this determination because it was consistent with an Oklahoma Supreme Court decision that held that POD designations violate the Statute of Wills.[117] The Tax Court noted, however, that the Oklahoma state legislature subsequently passed legislation validating POD designations, thereby reversing the Supreme Court decision.[118] Accordingly, the court held that at the time of the husband's death the wife became the sole owner of the CD, despite the state court order reciting that she was only one-third owner.

The Tax Court also ruled that under federal law the wife was the sole owner of the jointly-owned Series E savings bonds. The court refused to follow a state court order that approved an accounting giving the wife a one-third share of ownership in the bonds. Under federal law, if one of the co-owners of a savings bond dies, the surviving co-owner becomes the sole and absolute owner.[119] This federal rule of ownership preempts state property law decisions.

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[115] I.R.C. § 2035 (West Supp. 1989). This rule applies only on insurance on the life of the decedent and not on policies covering the lives of others.

[116] 94 T.C. 5 (1990).

[117] Waitman v. Waitman, 505 P.2d 171 (Okla. 1972).

[118] Okla. Stat. tit. 6, § 901 (1980).

[119] 31 C.F.R. § 315.70 (1988).

Many soldiers and their spouses hold property in joint ownership or in Payable on Death (POD) form of ownership. These forms of ownership carry the advantage of avoiding probate upon the death of the first spouse. As *Fletcher* illustrates, however, the disadvantage to this form of ownership is that it will increase the size of the gross estate of the surviving spouse and thereby generate additional federal estate taxes. MAJ Ingold.

Landlord-Tenant Law Notes

Fair Credit Reporting Act Applies to Reports on Tenants

Congress enacted the Fair Credit Reporting Act[120] (FCRA) to ensure that credit reports on consumers are fair and accurate.[121] Credit reporting agencies are required to follow "reasonable procedures" in order to assure maximum possible accuracy of reported information.[122] Congress also included notification requirements for users of credit reports. If a credit report user denies employment or denies credit for personal, family, or household purposes because of the credit report, the user must notify the consumer of the denial and provide the name and address of the consumer reporting agency that prepared the report.[123]

Traditionally, credit report users have been banks, credit unions, mortgage companies, department stores extending consumer credit, and the like. Some courts, however, have begun to more broadly define what can be a credit report, resulting in greater consumer protection. Landlord-tenant law is an area in which this trend may have increasing effect.

In *Cotto v. Jenney*[124] a landlord received a report on Iris D. Cotto, a prospective tenant. The report was prepared by the Landlord Reports Computer Service (LRCS), a tenant screening service operated by the defendants, Paul and Marlies Jenney. Based on information in the report that Iris Cotto had been late in making rent payments in the past, the landlord chose not to rent to Cotto, and he notified her that the decision was based on negative information supplied by LRCS.[125] Cotto contacted LRCS and disputed the information submitted to the landlord. Cotto then sued LRCS for failure to comply with the FCRA by not taking reasonable precautions to ensure the accuracy of its reports, as well as for unfair and deceptive trade practices and defamation.

LRCS argued that the report it issued on Cotto was not a consumer report under the FCRA. Because the report dealt with a landlord-tenant relationship rather than a creditor-debtor situation, LRCS believed the FCRA to be inapplicable. The court rejected this view. It noted that LRCS usually examined a prospective tenant's financial background to determine whether the individual would timely pay rent. LRCS was checking reports on earlier non-payment of rent, sources of income, late payments of rent, bounced checks, and court proceedings and judgments. The court determined that these actions were related to "credit worthiness" for purposes of compliance with the FCRA. Accordingly, it held that LRCS' report was a consumer report and subject to the requirement of reasonable accuracy under the FCRA.[126]

The implications for legal assistance clients are significant. If landlords are using a tenant referral service, and the service evaluates the likelihood of timely rent payments by use of background checks, then reports issued should comply with the FCRA. Landlords who reject tenants because of these reports should notify the tenants why their applications are rejected and furnish the name and address of the agency that prepared the report. Failure to notify the tenant of the reason for rejection when it is based on such a report may constitute a violation of the FCRA. Similarly, failure of the tenant referral service to follow reasonable procedures in assembling reports can also result in liability under the FCRA. The FCRA provides statutory penalties for negligent noncompliance with provisions of the Act, including actual damages, court costs, and reasonable attorneys fees if the consumer prevails.[127] Willful noncompliance remedies include all of the above as well as punitive damages.[128] MAJ Pottorff.

Dollar-a-Day Charge for Late Rent Constitutes Unlawful Penalty

Soldiers and family members often face additional charges for late payment of rent. While late charges are a legitimate means of compensation for landlords who suffer damages because of late payments, these charges cannot serve to simply penalize tenants. Many landlords do

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[120] 15 U.S.C. §§ 1681-1681t (1982).

[121] *Id.* § 1681(a).

[122] *Id.* § 1681e(b).

[123] *Id.* § 1681m(a).

[124] 721 F. Supp. 5 (D. Mass. 1989). *See also* Franco v. Kent Farm Village, No. 88-0115 (D. R.I. Sept. 16, 1988) (tenant screening report is a consumer report, and landlord using such a report was obliged to notify a prospective tenant that application was denied because of information in the report); Cisneros v. U.S. Registry, No. C654123 (Cal. Super. Ct. June 30, 1989) (tenant screening agency report was a consumer report subject to the California state credit reporting act).

[125] 721 F. Supp. 5, *reviewed by* Clearinghouse Review (March 1990), at 1435.

[126] 721 F. Supp. at 7.

[127] 15 U.S.C. § 1681o (1982).

[128] *Id.* § 1681n.

not understand this distinction and, in fact, have the latter purpose in mind when drafting late charge provisions in lease agreements.

As a general rule, if a landlord includes a late charges provision that is properly drafted as a liquidated damages charge, the landlord will be able to enforce it. If it is a penalty clause, however, it often will be unenforceable.[129] To qualify as liquidated damages, late charges should bear a reasonable relation to losses that a landlord is likely to sustain when a tenant is delinquent. A recent Vermont case highlights this difference between an enforceable liquidated damages clause and an unenforceable penalty.

In *Highgate Associates v. Merryfield*[130] a lease agreement required that the tenant pay rent by the end of the 5th day of each month. The lease imposed a $5.00 late charge on the 6th day of the month and a $1.00 per day late charge thereafter. When the tenant failed to pay rent, the landlord brought an action for unpaid rent, late charges of $397.00, and damages to the apartment. The court refused to allow the full late charges, holding that the late charge provision was an unenforceable penalty, not a liquidated damages clause. The court based its decision on several factors. First, the expenses the landlord actually incurred as a result of the late payments were readily determined to be $10.00 for mailing expenses and employee time. Second, the amount of the late charge was not related to the landlord's actual expenses. Last, the landlord's real purpose in assessing the late charge was to encourage tenants to pay rent on time.[131]

When landlords charge clients late fees, legal assistance attorneys should review their clients' lease agreements for unenforceable provisions. A common practice of some landlords is to simply write into the lease a fixed amount to be assessed on a daily basis if rent is late. Many courts will construe such a provision to be an unenforceable penalty because it bears no relation to the landlord's actual damages. Courts are more likely to enforce a late fee that is a percentage of the rent due. Even such a provision is subject to attack if, as in the *Highgate* case, the landlord cannot show its relationship to actual damages and tenants can demonstrate the true purpose is to encourage timely payments. Finally, if the lease purports to use portions of the security deposit for late fees, attorneys should carefully review state law. The majority view is that such a practice ordinarily will be unenforceable.[132] Some states have reported cases that prohibit use of security deposits in satisfaction of late charges; others have addressed the problem through legislation. MAJ Pottorff.

Consumer Law Note

Credit Card Address and Phone Number Requirements

In response to increasing consumer complaints, New York recently enacted legislation[133] that prohibits merchants honoring credit cards from demanding that consumers provide addresses and phone numbers on sales slips. In fact, the law carries a $250.00 penalty for merchants who insist on requiring such information.

New York's action follows general consumer dissatisfaction with merchants' requirements that additional personal information be provided before cards are honored.[134] As a practical matter, sufficient information can be obtained from the credit card itself, particularly for those merchants who choose to verify electronically the consumer's account and its status. Additionally, if a consumer fails to pay a merchant, most card issuers ordinarily agree to reimburse the merchant if the merchant followed proper procedures in authorizing the credit transaction. The new law also provides an exception for merchants who do not have the capability to electronically verify the information contained on a customer's credit card. In these circumstances, merchants may demand additional personal information.

Whether consumers in states that do not provide protections such as the New York law should refuse to provide their phone numbers and addresses to merchants is open to question. As a practical matter, many merchants will probably refuse to honor credit cards without the additional information. Although some consumer advocates have suggested supplying false information, legal assistance attorneys should discourage such a course of action. MAJ Pottorff.

Family Law Note

Uniformed Services Former Spouses' Protection Act Update

In response to requests from the field, we are publishing the following summary of decisional and statutory law on the divisibility of military retired pay in marital termination actions. This list was updated on April 15, 1990.[135] LTC Guilford.

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[129] *See* R. Schoshinski, American Law of Landlord and Tenant § 5:41 (1980 & Supp. 1989) [hereinafter Schoshinski] (citing 5 Corbin on Contracts § 1059 (1964)).

[130] No. 79-4-88WnC (Vt. Dist. Ct., Washington Cnty, Dec. 15, 1989) *reviewed by* Clearinghouse Review, March 1990, at 1451-52.

[131] The court also held that the tenant was not liable to the landlord for the costs of repainting the premises. The court determined that if the landlord did not wish to have rooms painted day-glo orange, the landlord should have provided more specificity in the lease. *Id.*

[132] Schoshinski, *supra* note 129, § 6.30.

[133] N.Y. Sess. Law Serv. § 361 (McKinney 1989) (WESTLAW, Legis-all library) *reviewed by* Bulletin, *New York Credit-Card Law Ends Address/Phone Requirements*, Consumer and Commercial Credit, Jan. 22, 1990, at 3.

[134] *See, e.g.*, Money Magazine, Dec. 1989, at 30-31.

[135] On May 30, 1989, the United States Supreme Court announced its decision in *Mansell v. Mansell*, 109 S. Ct. 2023 (1989). The Court ruled that states cannot divide the value of Department of Veterans Affairs disability benefits that are received in lieu of military retired pay. The Court's decision also strongly suggests that states are limited to dividing disposable retired pay, as defined in 10 U.S.C. § 1408(a)(4), in all cases. This suggests that state courts cannot divide disposable retired pay. In this regard, *Mansell* impliedly overrules case law in a number of states, and this must be kept in mind when using the list.

Alabama

Not divisible as marital property. *Tinsley v. Tinsley*, 431 So. 2d 1304, 1307 (Ala. Civ. App. 1983) (military pay is not divisible as marital property) (citing *Pedigo v. Pedigo*, 413 So. 2d 1154 (Ala. Civ. App. 1981)); *Kabaci v. Kabaci*, 373 So. 2d 1144 (Ala. Civ. App. 1979). But note *Underwood v. Underwood*, 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); *Phillips v. Phillips*, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded fifty percent of husband's gross military pay as alimony).

Alaska

Divisible. *Chase v. Chase*, 662 P.2d 944 (Alaska 1983), overruling *Cose v. Cose*, 592 P.2d 1230 (Alaska 1979), *cert. denied*, 453 U.S. 922 (1982). Nonvested retirement benefits are divisible. *Laing v. Laing*, 741 P.2d 649 (Alaska 1987). Note also *Morlan v. Morlan*, 720 P.2d 497 (Alaska 1986) (the trial court ordered a civilian employee to retire in order to ensure the spouse received her share of a pension—the pension would be suspended if the employee continued working; on appeal, the court held that the employee should have been given the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay; in reaching this result, the court cited the California *Gillmore* decision).

Arizona

Divisible. *DeGryse v. DeGryse*, 135 Ariz. 335, 661 P.2d 185 (1983); *Edsall v. Superior Court of Arizona*, 143 Ariz. 240, 693 P.2d 895 (1984); *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977) (a nonvested military pension is community property). A civilian retirement plan case (*Koelsch v. Koelsch*, 148 Ariz. 176, 713 P.2d 1234 (1986)) held that if the employee is not eligible to retire at the time of the dissolution, the court *must* order that the spouse begin receiving the awarded share of retired pay when the employee becomes *eligible* to retire, whether or not he or she does retire at that point.

Arkansas

Divisible. *Young v. Young*, 288 Ark. 33, 701 S.W.2d 369 (1986); *but see Durham v. Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986) (military retired pay not divisible where the member had not served twenty years at the time of the divorce, and therefore the military pension had not "vested").

California

Divisible. *In re Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); *In re Hopkins*, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (1983). Nonvested pensions are divisible; *In re Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). Note also *Casas v. Thompson*, 42 Cal. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33, *cert. denied*, 479 U.S. 1012, 107 S. Ct. 659 (1986) (courts may award a spouse a share of gross retired pay; but the *Mansell* case may have overruled state court decisions that they have authority to divide gross retired pay, and in *Mansell* the U.S. Supreme Court specifically disapproved portions of *Casas*). State law has held that military disability retired pay is divisible to the extent it replaces what the retiree would have received as longevity retired pay (*In re Mastropaolo*, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985); *In re Mueller*, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977), but the *Mansell* case also raises doubts about the continued validity of this proposition. If the member is not retired at the time of the dissolution, the spouse can elect to begin receiving the award share of "retired pay" when the member becomes *eligible* to retire, or anytime thereafter, even if the member remains on active duty. *In re Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980); see also *In re Gillmore*, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) (same principle applied to a civilian pension plan). Courts have discretion to order a retiree to select SBP protection for a former spouse; see Cal. Civil Code § 4108.4 and *In re Ziegler*, 207 Cal. App. 3d 788, 255 Cal. Rptr. 100 (1989).

Colorado

Divisible. *Gallo v. Gallo*, 752 P.2d 47 (Colo. 1988) (vested military retired pay is marital property); *see also In re Grubb*, 745 P.2d 661 (Colo. 1987) (vested but unmatured civilian retirement benefits are marital property; expressly overrules any contrary language in *Ellis v. Ellis*, 191 Colo. 317, 552 P.2d 506 (1976)), *and In re Nelson*, 746 P.2d 1346 (Colo. 1987) (applies *Grubb* in a case involving vested contingent pension benefits—contingency was that the employee must survive to retirement age). The *Gallo* decision will not be applied retroactively, however. *In re Wolford*, 1989 WL 109033 (Colo. Ct. App., Sept. 21, 1989) (not released for publication yet; rehearing and/or cert. may be pending). Note: notwithstanding language in the case law, some practitioners in Colorado Springs report that local judges divide military retired pay or reserve jurisdiction on the issue even if the member has not served for 20 years at the time of the divorce.

Connecticut

Probably divisible. Conn. Gen. Stat. § 46b-81 (1986) gives courts broad power to divide property. Note *Thompson v. Thompson*, 183 Conn. 96, 438 A.2d 839 (1981) (nonvested civilian pension is divisible).

Delaware

Divisible. *Smith v. Smith*, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible; *Donald R.R. v. Barbara S.R.*, 454 A.2d 1295 (Del. Super. Ct. 1982).

District of Columbia

Probably divisible. See *Barbour v. Barbour*, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Divisible. As of October 1, 1988, all vested and nonvested pension plans are treated as marital property to the extent that they are accrued during the marriage. Fla. Stat. § 61.075(3)(a)4 (1988); see also § 3(1) of 1988 Fla. Sess. Law Serv. 342. These legislative changes appear to overrule the prior limitation in *Pastore v. Pastore*, 497 So. 2d 635 (Fla. 1986), which held that vested military retired pay can be divided.

Georgia

Probably divisible. *Cf. Courtney v. Courtney*, 256 Ga. 97, 344 S.E.2d 421 (1986) (nonvested civilian pensions are divisible); *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982) (military retired pay may be considered in establishing alimony obligations); *Holler v. Holler*, 257 Ga. 27, 354 S.E.2d 140 (1987) (the court "[a]ssum[ed] that vested and nonvested military retirement benefits acquired during the marriage are now marital property subject to equitable division", citing *Stumpf* and *Courtney*, but then decided that military retired pay could not be divided retroactively if it was not subject to division at the time of the divorce).

Hawaii

Divisible. *Linson v. Linson*, 1 Haw. App. 272, 618 P.2d 748 (1981); *Cassiday v. Cassiday*, 716 P.2d 1133 (Haw. 1986). In *Wallace v. Wallace*, 5 Haw. App. 55, 677 P.2d 966 (1984), the court ordered a Public Health Service employee (who is covered by the USFSPA) to pay a share of retired pay upon reaching retirement age whether or not he retires at that point. He argued that this amounted to an order to retire, violating 10 U.S.C. 1408(c)(3), but the court affirmed the order. In *Jones v. Jones*, 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that *Mansell's* limitation on dividing VA benefits cannot be circumvented by awarding an offsetting interest in other property. It also held that *Mansell* applies to military disability retired pay as well as VA benefits.

Idaho

Divisible. *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975) (reinstated by *Griggs v. Griggs*, 197 Idaho 123, 686 P.2d 68 (1984)). Courts cannot circumvent *Mansell's* limitation on dividing VA benefits by using an offset against other property. *Bewley v. Bewley*, 780 P.2d 596 (Idaho Ct. App. 1989).

Illinois

Divisible. *In re Dooley*, 137 Ill. App. 3d 407, 484 N.E.2d 894 (1985); *In re Korper*, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985). *Korper* points out that under Illinois law a pension is marital property even if it is not vested. In *Korper*, the member had not yet retired, and he objected to the spouse getting the cash-out value of her interest in retired pay. He argued that the USFSPA allowed division only of "disposable retired pay," and state courts therefore are preempted from awarding the spouse anything before retirement. The court rejected this argument, thus raising the (unaddressed) question whether a spouse could be awarded a share of "retired" pay at the time the member becomes *eligible* for retirement (even if he or she does not retire at that point); see *In re Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980) for an application of such a rule. Note also Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allows modification of agreements and judgments that became final between 25 June 1981 and 1 February 1983 unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

Indiana

Divisible. Indiana Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, *inter alia*, "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage"). The right to receive retired pay must be vested as of the date of the divorce petition in order for the spouse to be entitled to a share (*In re Bickel*, 533 N.E.2d 593 (Ind. Ct. App. 1989), but courts should consider the nonvested military retired benefits in adjudging a just and reasonable division of property). Note *Authur v. Arthur*, 519 N.E.2d 230 (Ind. Ct. App. 1988) (Second District ruled that the statute cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date, which was 1 September 1985). But note *Sable v. Sable*, 506 N.E.2d 495 (Ind. Ct. App. 1987) (Third District ruled that the statute can be applied retroactively).

Iowa

Divisible. *In re Howell*, 434 N.W.2d 629 (Iowa 1989). The member had already retired in this case, but the decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the Veterans Administration, paid in lieu of a portion of military retired pay, are not marital property. Finally, it appears the court intended to award the spouse a percentage of *gross* military retired pay, but it actually "direct[ed] that 30.5% of [the husband's] *disposable retired pay*, except disability benefits, be assigned to [the wife] in accordance with section 1408 of

Title 10 of the United States Code ... " (emphasis added). The *Mansell* case may have overruled state court decisions that they have authority to divide gross retired pay.

Kansas

Divisible. Kan. Stat. Ann. § 23-201(b) (1987), effective July 1, 1987 (vested and nonvested military pensions are now marital property); *In re Harrison*, 13 Kan. App. 2d 313, 769 P.2d 678 (1989) (applies the statute and holds that it overruled the previous case law that prohibited division of military retired pay).

Kentucky

Divisible. *Jones v. Jones*, 680 S.W.2d 921 (Ky. 1984); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); H.R. 680, amending Ky. Rev. Stat. Ann. § 403.190 (Michie/Bobbs-Merrill 1986), expressly defines marital property to include retirement benefits.

Louisiana

Divisible. *Swope v. Mitchell*, 324 So. 2d 461 (La. 1975); *Little v. Little*, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property); *Jett v. Jett*, 449 So. 2d 557 (La. Ct. App. 1984); *Rohring v. Rohring*, 441 So. 2d 485 (La. Ct. App. 1983). Note also *Campbell v. Campbell*, 474 So.2d 1339 (Ct. App. La. 1985) (a court can award a spouse a share of disposable retired pay, not gross retired pay, and a court can divide VA disability benefits paid in lieu of military retired pay; this approach conforms to dicta in the *Mansell* case).

Maine

Divisible. *Lunt v. Lunt*, 522 A.2d 1317 (Me. 1987). Also note Me. Rev. Stat. Ann. tit. 19, § 22-A(6) (1989), which provides that the parties become tenants-in-common regarding property a court fails to divide or to set apart.

Maryland

Divisible. *Nisos v. Nisos*, 60 Md. App. 368, 483 A.2d 97 (1984) (applies Md. Fam. Law Code Ann. § 8-203(b), which provides that military pensions are to be treated the same as other pension benefits; such benefits are marital property under Maryland law—see *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981)). See also *Ohm v. Ohm*, 49 Md. App. 392, 431 A.2d 1371 (1981) (nonvested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA. *Andresen v. Andresen*, 317 Md. 380, 564 A.2d 399 (1989).

Massachusetts

Divisible. *Andrews v. Andrews*, 27 Mass. App. 759, 543 N.E.2d 31 (1989). Here, the spouse was awarded alimony from military retired pay; she appealed, seeking a property interest in the pension. The trial court's ruling was upheld, but the appellate court noted that " ... the judge could have assigned a portion of the pension to the wife [as property]."

Michigan

Divisible. *Keen v. Keen*, 160 Mich. App. 314, 407 N.W.2d 643 (1987); *Giesen v. Giesen*, 140 Mich. App. 335, 364 N.W.2d 327 (1985); *McGinn v. McGinn*, 126 Mich. App. 689, 337 N.W.2d 632 (1983); *Chisnell v. Chisnell*, 82 Mich. App. 699, 267 N.W.2d 155 (1978). Note also *Boyd v. Boyd*, 116 Mich. App. 774, 323 N.W.2d 553 (1982) (only vested pensions are divisible).

Minnesota

Divisible. *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay, but the *Mansell* case noted at the beginning of this list may have overruled state court decisions that they have the authority to divide gross retired pay. Note also *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible).

Mississippi

Divisible. *Powers v. Powers*, 465 So. 2d 1036 (Miss. 1985).

Missouri

Divisible. *Fairchild v. Fairchild*, 747 S.W.2d 641 (Mo. Ct. App. 1988) (nonvested and nonmatured military retired pay are marital property); *Coates v. Coates*, 650 S.W.2d 307 (Mo. Ct. App. 1983).

Montana

Divisible. In re *Marriage of Kecskes*, 210 Mont. 479, 683 P.2d 478 (1984); *In re Miller*, 37 Mont. 556, 609 P.2d 1185 (1980), *vacated and remanded sub. nom. Miller v. Miller*, 453 U.S. 918 (1981).

Nebraska

Divisible. *Taylor v. Taylor*, 348 N.W.2d 887 (Neb. 1984); Neb. Rev. Stat. § 42-366 (1989) (pensions and retirement plans are part of the marital estate).

Nevada

Probably divisible. *Tomlinson v. Tomlinson*, 729 P.2d 1303 (Nev. 1986) (the court speaks approvingly of the USFSPA in dicta but declines to divide retired pay in this

case involving a final decree from another state). *Tomlinson* was legislatively reversed by the Nevada Former Military Spouses Protection Act (NFMSPA), Nev. Rev. Stat. § 125.161 (1987) (military retired pay can be partitioned even if the decree is silent on division and even if it is foreign). The NFMSPA has been repealed, however, effective March 20, 1989; see Senate Bill 11, 1989 Nev. Stat. 34. The Nevada Supreme Court subsequently has ruled that the doctrine of *res judicata* bars partitioning military retired pay where "the property settlement has become a judgment of the court"; see *Taylor v. Taylor*, 775 P.2d 703 (Nev. 1989). Nonvested pensions are community property. *Gemma v. Gemma*, 778 P.2d 429 (Nev. 1989). The spouse has the right to elect to receive his or her share when the employee spouse becomes retirement eligible, whether or not retirement occurs at that point. *Gemma v. Gemma*, 778 P.2d 429 (Nev. 1989).

New Hampshire

Divisible. "Property shall include all tangible and intangible property and assets ... belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes ... employment benefits, [and] vested and non-vested pensions or other retirement plans.... [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution.... " N.H. Rev. Stat. Ann. § 458:16-a (1987) (effective Jan 1, 1988). This provision appears to overrule the earlier case of *Baker v. Baker*, 120 N.H. 645, 421 A.2d 998 (1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Divisible. *Castiglioni v. Castiglioni*, 192 N.J. Super. 594, 471 A.2d 809 (1984); *Whitfield v. Whitfield*, 222 N.J. Super. 36, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); *Kruger v. Kruger*, 139 N.J. Super. 413, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 73 N.J. 464, 375 A.2d 659 (1977). Post-divorce cost-of-living raises are divisible; *Moore v. Moore*, 553 A.2d 20 (N.J. 1989) (police pension).

New Mexico

Divisible. *Walentowski v. Walentowski*, 100 N.M. 484, 672 P.2d 657 (N.M. 1983); *Stroshine v. Stroshine*, 98 N.M. 742, 652 P.2d 1193 (N.M. 1982); *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969). Note also *White v. White*, 105 N.M. 800, 734 P.2d 1283 (N.M. Ct. App. 1987) (a court can award a spouse a share of gross retired pay; however, the *Mansell* case may have overruled state court decisions that they have authority to divide gross retired pay). In *Mattox v. Mattox*, 105 N.M. 479, 734 P.2d 259 (N.M. Ct. App. 1987), a civilian case, the court cited the California *Gillmore* case approvingly, suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire, even if the member elects to remain in active duty.

New York

Divisible. Pensions in general are divisible; *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984). Most lower courts hold that nonvested pensions are divisible; see, e.g., *Damiano v. Damiano*, 94 A.D.2d 132, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division; e.g., *Lydick v. Lydick*, 130 A.D.2d 915, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); *Gannon v. Gannon*, 116 A.D.2d 1030, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation; *West v. West*, 101 A.D.2d 834, 475 N.Y.S.2d 493 (N.Y. pp. Div. 1984). In *McDermott v. McDermott*, 474 N.Y.S.2d 221, 225 (N.Y. Sup. Ct. 1984), a civilian case, the court ruled that it can "limit the employee spouse's choice of pension options or designation of beneficiary where necessary, to preserve the non-employee spouse's interest.... "). This suggests that New York courts can order a member to elect SBP protection for a former spouse.

North Carolina

Divisible. N.C. Gen. Stat. § 50-20(b) (1988) expressly declares vested military pensions to be marital property. In *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd on other grounds*, 319 N.C. 367, 354 S.E.2d 506 (1987), the court suggested that vesting occurs when officers serve for twenty years but not until enlisted personnel serve for thirty years. But in *Milam v. Milam*, 92 N.C. App. 105, 373 S.E.2d 459 (1988), the court ruled that a warrant officer's retired pay had "vested" when he reached the 18-year "lock-in" point. Note also *Lewis v. Lewis*, 83 N.C. App. 438, 350 S.E.2d 587 (1986) (a court can award a spouse a share of *gross* retired pay, but due to the wording of the state statute the amount cannot exceed fifty percent of the retiree's *disposable* retired pay; however, the *Mansell* case may have overruled state court decisions that they have authority to divide gross retired pay).

North Dakota

Divisible. *Delorey v. Delorey*, 357 N.W.2d 488 (N.D. 1984). Note also *Morales v. Morales*, 402 N.W.2d 322 (N.D. 1987) (equitable factors can be considered in dividing military retired pay, so 17.5% award to seventeen-year spouse is affirmed), and *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984) (a court can award a spouse a share of gross retired pay; however, the *Mansell*

case may have overruled state court decisions that they have authority to divide gross retired pay).

Ohio

Divisible. *Anderson v. Anderson*, 468 N.E.2d 784, 13 Ohio App. 3d 194 (1984). Note also *Lemon v. Lemon*, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988) (nonvested pensions are divisible as marital property).

Oklahoma

Divisible. *Stokes v. Stokes*, 738 P.2d 1346 (Okla. 1987) (based on a statute that became effective on 1 June 1987). The state Attorney General had earlier opined that military retired pay was divisible, based on the prior law.

Oregon

Divisible. *In re Manners*, 68 Or. App. 896, 683 P.2d 134 (1984); *In re Vinson*, 48 Or. App. 283, 616 P.2d 1180 (1980). Note also *In re Richardson*, 307 Or. 370, 769 P.2d 179 (1989) (nonvested pension plans are marital property). The date of separation is the date for classification as marital property.

Pennsylvania

Divisible. *Major v. Major*, 359 Pa. Super. 344, 518 A.2d 1267 (1986) (nonvested military retired pay is marital property).

Puerto Rico

Not divisible as marital property. *Delucca v. Colon*, 118 P.R. Dec. _____ (1987) (case no. 87-JTS-104, Sept. 25, 1987). This case overruled *Torres-Reyes v. Robles-Estrada*, 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. Pensions may be considered, however, in setting child support and alimony obligations.

Rhode Island

Probably divisible. R.I. Pub. Laws § 15-5-16.1 (1988) gives courts very broad powers over the parties' property to effect an equitable distribution.

South Carolina

Divisible. *Martin v. Martin*, 373 S.E.2d 706 (S.C. Ct. App. 1988) (vested military retirement benefits are marital property; also, present cash value determination can be based on gross pension value, as opposed to net pension value; the case is based on a 1987 amendment to state law—see S.C. Code § 20-7-471 (1987). But note *Walker v. Walker*, 368 S.E.2d 89 (S.C. Ct. App. 1988) (wife lived with parents during entire period of husband's naval service; since she made no homemaker contributions, she was not entitled to any portion of the military retired pay).

South Dakota

Divisible. *Gibson v. Gibson*, 437 N.W.2d 170 (S.D. 1989) (the court states that military retired pay is divisible—in this case, it was reserve component retired pay where the member had served twenty years but had not yet reached age sixty); *Hautala v. Hautala*, 417 N.W.2d 879 (S.D. 1987) (trial court awarded spouse forty-two percent of military retired pay, and this award was not challenged on appeal); *Moller v. Moller*, 356 N.W.2d 909 (S.D. 1984) (the court commented approvingly on cases from other states that recognize divisibility but declined to divide retired pay here because a 1977 divorce decree was not appealed until 1983). As for pensions in general, see *Caughron v. Caughron*, 418 N.W.2d 791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); *Hansen v. Hansen*, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); *Stubbe v. Stubbe*, 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible; the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

Tennessee

Divisible. Tenn. Code Ann. § 36-4-121(b)(1) (1988) defines all vested pensions as marital property. No reported Tennessee cases specifically concern military pensions.

Texas

Divisible. *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982). Note also *Grier v. Grier*, 731 S.W.2d 936 (Tex. 1987) (a court can award a spouse a share of gross retired pay, but post-divorce pay increases constitute separate property; the *Mansell* case may have overruled state court decisions that they have authority to divide gross retired pay). Pensions need not be vested to be divisible. *Ex Parte Burson*, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay, and this ruling is in accord with the *Mansell* decision.

Utah

Divisible. *Greene v. Greene*, 751 P.2d 827 (Utah Ct. App. 1988). The case clarifies that non-vested pensions can be divided under Utah law, and in dicta it suggests that only disposable retired pay is divisible, not gross retired pay.

Vermont

Probably divisible. Vt. Stat. Ann. tit. 15, § 751 (1988) provides that "The court shall settle the rights of the parties to their property by ... equit[able] divi[sion]. All

property owed by either or both parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property ... shall be immaterial, except where equitable distribution can be made without disturbing separate property."

Virginia

Divisible. Va. Ann. Code § 20-107.3 (1988) defines marital property to include all pensions, whether or not vested. *See also Mitchell v. Mitchell*, 4 Va. App. 113, 355 S.E.2d 18 (1987); *Sawyer v. Sawyer*, 1 Va. App. 75, 335 S.E.2d 277 (Va. Ct. App. 1985) (these cases hold that military retired pay is subject to equitable division).

Washington

Divisible. *Konzen v. Konzen*, 103 Wash. 2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (nonvested pension held to be divisible); *Payne v. Payne*, 82 Wash. 2d 573, 512 P.2d 736 (1973); *In re Smith*, 98 Wash. 2d 772, 657 P.2d 1383 (1983).

West Virginia

Divisible. *Butcher v. Butcher*, 357 S.E.2d 226 (W.Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution, and a court can award a spouse a share of gross retired pay; however, the *Mansell* case may have overruled state court decisions that they have authority to divide gross retired pay).

Wisconsin

Divisible. *Thorpe v. Thorpe*, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); *Pfeil v. Pfeil*, 115 Wis. 2d 502, 341 N.W.2d 699 (Wis. Ct. App. 1983). See also *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978) (nonvested pension held to be divisible) and *Rodak v. Rodak*, 150 Wis. 2d 624, 442 N.W.2d 489, (Wis. Ct. App. 1989) (portion of civilian pension that was earned *before* marriage is included in marital property and subject to division).

Wyoming

Divisible. *Parker v. Parker*, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property).

Canal Zone

Divisible. *Bodenhorn v. Bodenhorn*, 567 F.2d 629 (5th Cir. 1978).

Claims Report

United States Army Claims Service

POV Shipment Claims: Demystifying the Recovery Process

Mr. Andrew J. Peluso
U.S. Army Claims Service, Europe

Introduction

On 15 January 1988, the U.S. Army Claims Service, Europe (USACSEUR), assumed responsibility for a new carrier recovery program: privately owned vehicles (POV's) transported at government expense between the Military Traffic Management Command (MTMC) Bremerhaven Terminal and military communities in central and southern Germany.[1] The extension of government contracting into motor carrier transport made it imperative that POV shipment claims be reviewed

[1] 10 U.S.C. § 2634 (1988), had previously restricted surface transportation to movement "between customary ports of embarkation and debarkation." This required vehicle owners to deliver and pickup their POV's at MTMC Terminals. This constraint was removed when the statute was amended to state, "by other surface transportation if such means of transport does not exceed the cost to the United States of other authorized means."

within USAREUR to determine if liability existed against motor carriers prior to forwarding files to the Military Sealift Command (MSC). To provide uniformity of review and a central point of contact for other government agencies involved in the program, the decision was made to centralize the recovery program at USACSEUR.[2]

With the implementation of the inland movement of POV program, USACSEUR became the first claims service to assume a recovery mission for POV claims. Previously, POV recovery was the responsibility of other agencies: MSC for ocean carrier liability and MTMC terminals for stevedore and longshoremen liability. The recovery mission consists of pre-demand review for all POV shipment claims processed by the thirty-six USAREUR field claims offices affected by the inland transport program and asserting demands for damages attributable to the inland carrier.[3] In addition, USACSEUR assumed responsibility to determine if liability existed against stevedore or longshoremen contractors in Bremerhaven.[4]

Inherent in pre-demand review is the post-settlement review of the field claims office's adjudication and a determination of whether it satisfies the requirements for a demand on third parties. Adjudicating a claim is not merely settling the claim fairly, but also developing a claim analysis chart that will ensure that recovery demands are made for a sum certain against any contractor in the transit chain. In FY 89, POV shipment claims accounted for twenty-one percent of all claims paid by USAREUR claims offices.[5] Claims personnel, from the claims judge advocate to the claims clerk, must understand the relationship between adjudication and recovery. This article will explain the purpose of documents common to all POV shipment claims and how they are integrated into the adjudication and recovery process.

The DD FORM 788 Private Vehicle Shipping Document

The purpose of the DD Form 788 is threefold. First, it is used to conduct a joint inspection and document the condition of the POV at the time of turn-in for shipment. An "X" code will be used to identify pre-existing damages (PED). Accessory items will be inventoried and listed in the "accessories" block. The member or member's agent will acknowledge, by signing and dating the DD Form 788, that the inspection of the vehicle, as recorded, is a true representation of the POV's condition at time of turn-in.

Second, it is used to determine the validity of claims for loss or damage, with transit damage annotated at each phase of the shipment process using the appropriate user and condition codes. The final inspection phase occurs when the member or his agent picks up the POV at destination. An authorized inspector or contractor's representative will perform a joint inspection of the POV with the member or his agent, noting on the reverse of the DD Form 788 any damage or discrepancies not previously annotated.

Finally, it is used to determine third party responsibility. Because, in theory, the POV is reinspected at each phase of shipment, responsibility for loss or damage can be assigned to the stevedore, longshoremen, ocean carrier, or inland carrier in whose custody the damage occurred. A set of six user codes is provided on the form ("X", "T", square, diamond, circle, asterisk) for use during each of the successive inspections of the POV's condition. The condition codes will be used to identify the type and location of exterior or interior damage. If the damage occurred while the POV was in the custody of a MTMC Terminal, then no third party liability exists.

The DD Form 788 is a seven-ply document. Two copies of the form should be available to claims personnel for adjudication, and claims personnel must understand their uses and limitations. The claimant will have one copy that was issued to him at the port of embarkation. This is a carbon entry copy, and it will reflect all PED ("X" codes) annotated during the joint inspection when the POV was turned-in for shipment. No transit damage codes will appear. This copy assists claims personnel to define PED clearly before the transit damage codes are entered on the remaining copies. However, this copy is inadequate to complete processing of a POV shipment claim for two reasons. It does not reflect the lift

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[2] Army Reg. 27-20, Legal Services, Claims, para. 11-35 (20 Feb. 1990) [hereinafter AR 27-20] prescribes that field claims offices will forward files to USACSEUR if there is evidence of liability attributable to the inland shipment of POV's in Europe. As a policy, USACSEUR directed that all USAREUR processed POV shipment files be forwarded for pre-demand review. USAREUR field claims offices have, in effect, been relieved of the responsibility to determine liability under this paragraph. CONUS field claims offices must perform a pre-demand review. In calendar year 1989, 3,885 files were received at USACSEUR for pre-demand review.

[3] There are 48 field claims offices in USAREUR. Claims offices in Berlin, Bremerhaven, and Rheinberg, West Germany; Belgium; the Netherlands; Italy; Greece; and Turkey are not affected by the inland shipment program and are, therefore, not subject to the centralized recovery program.

[4] AR 27-20, para. 11-33, prescribes that field claims offices will process claims against stevedore and longshoremen contractors. Coordination with MTMC-Bremerhaven Terminal and the U.S. Army Contracting Command, Europe, Regional Contracting Office-Bremerhaven, revealed that no claims had ever been received from any Army claims office.

[5] The USAREUR personnel claims program spent $16,000,000 in FY 89, of which over $3,300,000 was for POV shipment claims.

information MSC requires to assert a demand on an ocean carrier, and it does not reflect the transit damage codes necessary to apportion liability among ocean carrier, inland carriers, stevedores or longshoremen. Files forwarded to MSC with only this copy will be rejected for billing (a demand against the ocean carrier, stevedores or longshoremen) and retired to record storage.

The second document available to claims personnel is the DD Form 788, #1 copy. This copy reflects user and condition codes for all damages occurring in transit. In addition, it reflects the lift information (vessel/voyage number) necessary for MSC to identify the liable ocean carrier. Claims personnel are required to determine whether liability exists against stevedores or longshoremen per AR 27-20, paragraph 11-33, or against ocean carriers per AR 27-20, paragraph 11-35. Without the #1 copy, these responsibilities cannot be met. Obtaining this copy depends on the distribution practices of the MTMC port of debarkation (POD). Some POD's may release the document directly to the POV owner. If not, or if the POV owner has lost it, then claims personnel must request the POD to provide a photocopy. Always attempt to obtain the original copy which will have color coded entries that assist in determining contractor liability.

The Repair Estimate

Repair estimates must identify and provide itemized cost for each element of the repair. The term "element" should not be construed as each nut and bolt in the repair, but rather, each major component of the POV that was damaged, e.g., left front fender, hatchback, roof. The repair estimate must be itemized to reflect the cost of labor, paint, and parts necessary to repair each element.

Why so? The POV transit chain requires the employment of several contractors, each performing separate services, e.g., stevedores, longshoremen, ocean and inland carriers. Each contractor works independently and is only liable for loss or damage that occurs while the POV is in his possession. POV claims, therefore, almost always involve issues of split liability, e.g., stevedore dented the roof, longshoremen dented the front bumper, and motor carrier scraped the left door. Because each of these contractors bears separate liability, a demand for a sum certain must be asserted against each. This process begins by obtaining repair estimates that can be used effectively during adjudication. On these repair estimates, each element of the repair is identified and an itemized cost provided. Estimates that "lump sum" labor or painting or parts or all three cannot be adjudicated on a line-item by line-item basis. USACSEUR cannot make a demand for a sum certain based on a lump sum settlement. Negotiations with the transport industry result in USACSEUR heavily compromising settlements, and offsets may be challenged by litigation.[6] In addition, repair firms that refuse to provide an itemized breakdown should be viewed as highly suspect sources of repair work and may even be in violation of local consumer protection laws.[7]

The POV Claims Inspection and Worksheet

The purpose of a POV claims inspection is to provide claims personnel an opportunity to objectively assess the extent of transit damage and to identify issues relevant to adjudication of the claim. A claims inspection cannot serve in lieu of the joint inspection between the owner or his agent and the authorized government inspector or the contractor's representative. A claims inspection cannot cure a waiver of notice and verification that occurred during the joint inspection. As a general rule, any loss or damage discovered after the joint inspection and departure from the pickup point cannot be verified by a Government inspector or a contractor's representative, and a claim for those items may not be honored.[8] However, there are instances when the extent of damage is not readily apparent, such as mechanical damage.[9]

POV claims inspections must be conducted in a uniform manner, regardless of who is making the inspection. A POV claims inspection worksheet will assist in this objective. The worksheet must be designed so that a

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[6]The Federal Acquisition Reg. § 32.606 (1 Apr. 1988) establishes procedures for debt determination and involuntary collection of monies owed from the contractor's account.

[7]The U.S. Office of Consumer Affairs publishes the *Consumer Resource Handbook*, which provides a synopsis of state laws and agencies responsible for their enforcement. A free copy can be obtained by writing to the Consumer Affairs Center, Pueblo, CO 81009. For offices outside CONUS, claims personnel should consult with their foreign law legal adviser to determine if the estimates being provided U.S. personnel satisfy local law.

[8]Military Traffic Management Command Pamphlet, *Shipping Your POV*, at 15 (1989).

[9]The high mobility of POV's creates the inherent risk that a POV could be subsequently damaged in a situation that is not transit related or incident to service. This is, in part, why claims service policy is not to pay for hit-and-run incidents that allegedly occurred on military installations. The joint inspection, therefore, reflects not only contractual requirements and the practice of the industry, but also claims service policies in other POV related areas.

detailed description can be accurately recorded for each element of the claim. Each element may be subject to different degrees of PED, or different depreciation factors or different adjudication issues. For example, the left door of a POV may have fifty percent PED, the right rear fender twenty-five percent PED, and the roof no PED. Because each element will require a different cost to repair, the correct percentage of PED must be deducted for each element. A "lump sum" PED deduction, e.g., twenty-five percent for the entire POV, will result in either overpayment or underpayment of the claimant. A worksheet that demonstrates the inspection process in an objective manner not only ensures the fair settlement of claims, but also the validity of the recovery action (See Appendix).

A POV claims worksheet can also be an effective checklist. As part of the inspection, claims personnel should match the DD Form 1844 to the DD Form 788 and to the repair estimate. Are all the claimed damages documented as transit related? Are the repairs on the estimate limited to the claim? Frequently, normal maintenance costs or non-transit damages are claimed. Sometimes these non-transit repairs are not claimed on the DD Form 1844, but the claims office erroneously makes payment because they were included in the estimate.

The DD FORM 1844
Schedule of Property and Claims Analysis Chart

The purpose of the DD Form 1844 is defined by its title. Each element of the claim must be identified (schedule of property), and each element of the claim must be adjudicated on a line-by-line basis (claims analysis chart). The claims analysis chart is how one claims office determines settlement and recovery amounts and explains the settlement process to a claimant, another claims office, another government agency, or a member of industry. Uniformity of application by field claims personnel is essential to ensure uniformity of interpretation by other claims examiners.

The claimant must identify each element of the claim, e.g., left front fender, right rear door, and list them as a separate line item on the DD Form 1844. The claimant must state how each element was damaged and provide a repair cost for each line item. This, of course, requires that the repair estimate be itemized. Unless the POV is a total loss, a claimant's description of the damage on the DD Form 1844 as a "1985 Ford" is wrong, and claims personnel must have the claimant correct his DD Form 1844 as quickly as possible.

The adjudication must provide a sum certain for the amount allowed on each line item. "Lump summing" the entire claim or combining the repair costs for several elements of the claim is unacceptable and results in lost recovery dollars. Body work that involves the repair of a door, a fender, and a trunk lid must be itemized for each element. An element of the claim may involve several cost factors: parts, labor, and painting. The adjudicator must assemble these costs into the correct amount allowed for each element, and the amount allowed must reflect the appropriate PED, loss of value (LOV), or applicable depreciation factor. It is incorrect to apply a lump sum PED percentage to the entire claim. Because different contractors may be liable for each element of the claim, the amount allowed must be tailored to the correct percentage of PED. This, in turn, will reflect each contractor's liability for transit damages that occurred while the POV was in his possession.

Contractor Recovery

The specificity required to adjudicate a POV shipment claim is no different than in a household goods claim. An adjudicator would not combine several items of furniture, even if from the same set, as a single line item. Nor would it be correct to apply the same PED percentage for the entire claim when the inventory reflects varying degrees of PED. "Averaging out" PED, depreciation, or LOV is an erroneous adjudication practice for household goods or POV shipment claims.

For POV recovery, specificity in the adjudication process is uniquely important. Unlike household goods recovery, where a carrier has thorough responsibility for a shipment, contractors in the POV shipment system are independent: no agency relationship exists.[10] The ocean carrier, inland carriers, stevedores, or longshoremen, in CONUS or in Europe, are only liable for the loss or damage that occurs while the POV is in their custody. They are entitled to know to a sum certain what their liability is. This can only be accomplished if the DD Form 1844 correctly serves its purpose as a claims analysis chart. For instance, an ocean carrier may bear $500 liability for damage to a roof, a stevedore $300 for a fender, and an inland carrier $250 for a door. "Lump

[10] An exception to the thorough responsibility for household goods shipments is the direct procurement method (DPM) shipment mode. DPM liability is normally placed on the destination contractor who is contractually presumed liable for any loss of damage in shipment. There is no contractual presumption of liability in the POV shipment claim.

summing" the repair cost as a single item defeats the recovery action. Another adjudication error that will adversely affect recovery is applying an across the board PED percentage to the entire POV. In our illustration, the roof may not have had any PED; therefore, the ocean carrier was not entitled to any reduction of his liability even though PED existed elsewhere on the POV. At the same time, the stevedore and the inland carrier will be demanding that a greater percentage of PED be applied to the damages for which they are charged.

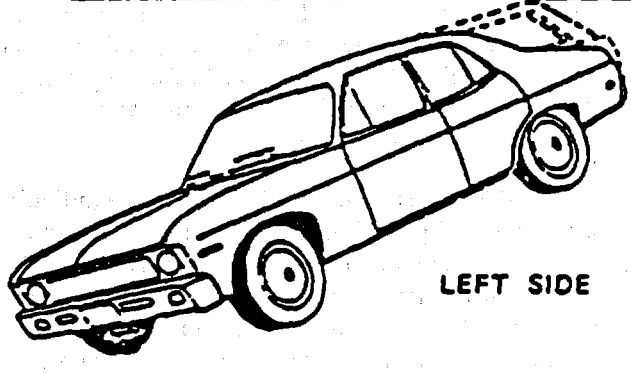
For field claims personnel, the final step in the POV recovery process is to determine to which agency the file should be forwarded to assert a demand on a contractor. AR 27-20, paragraph 11-33, requires that if the claim indicates that liability exists against a stevedore or related services contractor (longshoremen), then the claims office will process the claim through the responsible contracting officer for withholding from the contractor's account. AR 27-20, paragraph 11-35, provides that if the claim indicates liability only against an ocean carrier, then it will be forwarded to MSC. If the file also indicates liability against the inland carrier, however, then it is forwarded to USACSEUR.

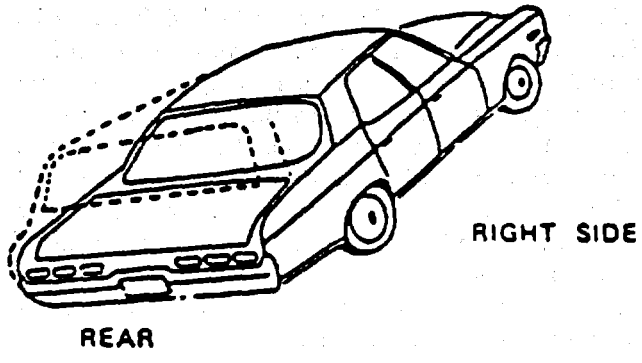
To comply with the above requirements, field claims personnel must match the user codes on the DD Form 788 to the line items claimed on the DD Form 1844. The DD Form 788 determines which contractors (user codes) caused what damages (condition codes). The DD Form 1844 determines the extent of pecuniary liability against each of the contractors. A demand can now be made for a sum certain against any contractor in the transit chain.

Determining contractor liability is relatively easy. The key is ensuring that the DD Form 1844 serves its intended purpose as a claims analysis chart. This requires well documented inspections, itemized repair estimates, client control in drafting the DD Form 1844, and adjudicating each element of the claim on a line by line basis. If these factors are accomplished, then a good work product will be created, preventive litigation effectively practiced, and compromises with industry reduced.

APPENDIX

CLAIMANT _____ CLAIM NO. _____ POV TYPE/YR _____





DD FORM 1844	788	REPAIR EST	% PED	COMMENTS

Claims Notes

Personnel Claims Recovery Note

Addressing DD Form 1843

Some claims offices in USAREUR occasionally enter the address for U.S. Army Claims Service, Europe, on the DD Form 1843, Demand on Carrier/Contractor, in files they are forwarding to U.S. Army Claims Service (USARCS) at Fort Meade. At the same time, files forwarded to the U.S. Army Claims Service, Europe, sometimes have USARCS' address entered on the DD Form 1843. Similarly, in CONUS a claims office will sometimes misaddress the DD Form 1843 by entering its own address on a file that will be forwarded to USARCS for centralized recovery.

It is imperative that the "Name and Address of Claimant" block be completed correctly to reflect the service that will process the demand. Carriers are required to respond to whatever address is reflected in this block. Demands dispatched with the incorrect address result in carriers corresponding with the wrong claims service. Unmatched correspondence and unmatched checks result from this error. Further, a carrier may have forwarded a check to one claims service, while the other claims service initiated an offset action through finance channels.

In order to avoid a great deal of needless effort by USARCS and USACSEUR, we ask claims examiners to ensure that they enter the address of the correct claims service on the DD Form 1843. Mr. Frezza and Mr. Peluso.

Personnel Claims Note

Claims for Military Uniforms

As stated in the Allowance List—Depreciation Guide, Item No. 47, and paragraph 2-40e, DA Pam 27-162, normally no depreciation should be taken on military uniforms, and uniforms should not be counted toward the maximum allowance for clothing. T-shirts, underwear, socks, low quarter shoes, gym clothing, and towels are *not* considered military uniform items, even if these items are brown, olive drab, or Army grey; for this reason, such items should be depreciated. Military uniform items include military shirts, pants, skirts, jackets, field jackets, wind breakers, raincoats, belts, ties, insignia, gloves, hats, combat boots, and similar items.

In keeping with this general rule, depreciation should not be taken on items that are being phased out but are still authorized for use. In valuing such items, however, claims personnel should use the item's purchase price, rather than the replacement cost for an update (new) item.

Items that have been phased out and are no longer authorized for wear are no longer considered uniforms, and both depreciation and obsolescence should be taken on such items. Less obsolescence should be taken on phased-out items that are readily adaptable to civilian uses—such as windbreakers or fatigue pants—than on items that are not readily adaptable.

Finally, as an exception to the general rule that uniform items should not be depreciated, military uniform items that belong to persons separating from military service should be depreciated to avoid granting these claimants a windfall. Note, however, that persons leaving active duty and entering a reserve component are not separating from military service. Ms. Holderness.

Affirmative Claims Notes

Deposits

Recovery judge advocates receiving money for the government from any source shall deposit the money in the Treasury in accordance with 31 U.S.C. § 3302.

Funds received in medical care recovery cases will usually be deposited in Account 21R3210 (Miscellaneous Receipts Account) with the appropriate finance and accounting office. Any funds collected in a claim where a waiver request is pending should be deposited in accordance with paragraph 14-15c(3)(c), AR 27-20.

Monies received from government property damage claims will be deposited in Account 21R3019 (Recoveries for Government Property Lost or Damaged) with the appropriate finance and accounting office. Any funds collected in a claim where a waiver request is pending should be deposited in accordance with paragraph 14-11c(2).

All deposits will be recorded and submitted on DD Form 1131 (Cash Collection Voucher). *These account numbers do not change at the beginning of the fiscal year (FY).* MAJ Morgan.

Compromise and Waiver Requests

When forwarding requests for waiver or compromise to the Affirmative Claims Branch, the following guidelines should be noted. When filling out the affirmative claims medical care recovery worksheet, attach only the pertinent documents relevant to the settlement of the claim; enclosures should be kept to a minimum. Time spent in file assembly can be better utilized for the aggressive pursuit of other claims. MAJ Morgan.

Management Notes

Missing Settlement Checks and Checks Returned by Claimants

A claimant will sometimes call the claims office to say that he or she has not received a check on a claim that has long since been settled. In their zeal to assist the soldier, a few claims offices have been tempted to cut new vouchers. This is not the proper procedure.

If a claimant states that he or she has not received payment on a settled claim, claims personnel should coordinate with the finance and accounting office (F&AO) to ensure that a check was issued. If so, the claimant whose check is missing should be directed to send a letter to the F&AO asking for a new check to be recertified under the provisions of AR 37-103. (See AR 27-20, para 2-24e).

Similarly, a claimant will occasionally return a check forwarded in full settlement of a personnel claim (AR 27-20, Chap 11) to express dissatisfaction with the adjudication. The check should be immediately returned and the claimant advised that acceptance will not affect his or her rights in the claims process. The claimant should be further informed that if any additional payment is awarded on reconsideration, a supplemental check will be issued. If a claimant persists in returning a check, the check should be forwarded to the F&AO for disposal and the claimant informed of the mechanism for having the F&AO recertify it. Mr. Frezza.

Sorting and Marking Claims Files Sent to USARCS

Each year, nearly 100,000 tort and personnel claims files are forwarded to USARCS for one reason or another. Unless these files are correctly sorted and marked, USARCS has a colossal administrative task in reducing chaos to order. We need the assistance and cooperation of each field claims office in this endeavor.

On 6 March 1990, USARCS sent all field offices a message on sorting files prior to shipment. That message requested that, in addition to the requirements of paragraphs 11-36 and 15-3, AR 27-20, when files are forwarded to USARCS, field offices should separate all files into four groups.

1. Group 1 should include only closed personnel claims.

2. Group 2 should include only personnel claims forwarded for centralized recovery.

3. Group 3 should include only closed tort claims; and Group 4 should include only personnel or tort claims requiring action [other than recovery] at USARCS.

Within the groups specified above, files should be sorted by claim number. Place dividers between each group and label the dividers so that personnel opening packages of files will be able to determine which type of file is in the group.

Note, however, that this sorting process should *not* hold up forwarding files until offices have some in each group. If, for example, you only have recovery files ready to ship, send them with a note saying "Recovery Files Only."

In addition, even sorted files need to have the proper markings clearly printed on the outside front cover of the manila file folder in *red ink* to indicate how USARCS should handle the file. Every file should be marked in some manner; occasionally a file will require more than one marking. References to marking files are scattered throughout AR 27-20 and DA Pam 27-162; the following constitutes a comprehensive guide for marking disposition information on files.

Closed personnel claims files (Sorting Group 1) are marked "CLOSED—PC" (see, e.g, para. 3-26*e*, DA Pam 27-162), and closed tort claims files (Sorting Group 3) are marked "CLOSED—TORT." A *closed* file is a claims file which has been settled in the field, has not been reopened, and does *not* require any type of recovery or other action by USARCS.

Personnel claims files forwarded for centralized recovery (Sorting Group 2) are marked in a number of ways. Files involving bankrupt carriers are immediately forwarded marked "BANKRUPT" (para. 3-2*h*, DA Pam 27-162). Files forwarded as impasses for offset action by USARCS should be marked "IMPASSE" if the carrier responded to a demand and further negotiations are futile, or as "IMPASSE—NO RESPONSE" if the carrier did not respond to a demand within 120 days (para. 3-26*b*, DA Pam 27-162).

Files involving Increased Released Valuation or Replacement Cost Protection/Full Replacement Protection should be marked "IRV" or "RCP" respectively (para. 11-30, AR 27-20); if the claimant may be due additional payment when carrier recovery is effected, the file should also be marked "CLAIMANT DUE CARRIER RECOVERY" with the amount (para. 3-8*d*(3), DA Pam 27-162). Files involving payment to the claimant by a private insurer are marked "INSURANCE."

Files involving payment to the claimant of the full statutory limit under the Personnel Claims Act should be marked "STATUTORY LIMIT"; however, the statutory limit for claims arising after 1 October 1988 is $40,000, and no field claims office is presently authorized to pay more than $25,000. For this reason, field offices should not mark claims arising after 1 October 1988 as "STATUTORY LIMIT."

Other recovery files may simply be marked "RECOVERY." Mobile home files should be marked "MOBILE HOME."

Open personnel and tort claims files (Sorting Group 4) include mirror tort claims files, as well as personnel and tort claims files that require some settlement action by USARCS. They are also marked in several ways.

Open personnel claims forwarded for reconsideration are marked "RECONSIDERATION" (para. 2-59*d*, DA Pam 27-162); if the original file was lost and had to be reconstructed, the reconstructed file is marked "RECONSTRUCTED" (para. 2-57*e*, DA Pam 27-162). If the claim was filed by the SJA or the SJA's rater and forwarded pursuant to paragraph 2-20*d*, AR 27-20, the file should be marked "SJA/RATER."

Mirror tort claims files or additions to mirror tort claims files, forwarded as set forth in paragraph 5-19, DA Pam 27-162, will be marked "MIRROR FILE" and will always have the claim number marked on them. Open tort claims files forwarded for final action by USARCS will be marked "OPEN TORT." Any mirror or open tort claim file which is a companion claim—that is, arising from the same incident as another claim—will also be marked with the companion claims numbers and the names of the other claimants. Finally, all types of files involving congressional interest should be marked "CONGRESSIONAL INTEREST." Nonappropriated fund personnel or tort claims files are marked "NAF" on the label, immediately following the claimant's name, to ensure that they are not improperly paid from appropriated funds in accordance with paragraph 12-3*b*(2)(b), AR 27-20. Also, from time to time, USARCS may require certain files to be specially marked (e.g., Operation Just Cause claims are marked "OJC" and forwarded to JACS-PC (Mr. Frezza)).

In addition, all personnel and tort claims files—open, closed, mirror, or forwarded for recovery—forwarded to USARCS will include a paper screen printout from the Personnel Claims or Tort and Special Claims Management Program.

Adherence to these procedures will greatly reduce both the burden on USARCS and the number of lost files. Again, we request the cooperation of every claims office. Mr. Frezza.

Command Expenditure Allowance (CEA) Reporting Requirements

Change 2 to AR 27-20 (28 Feb 90; effective 27 Mar 90), recapitulates the monthly financial reporting requirements for each command claims service and CONUS claims office having a CEA. The monthly report, which must be received by the *seventh calendar day* of the month, is to provide the USARCS Budget and Information Management Office, with the following:

1. The office code of the reporting office. (NOTE: Paragraph 15-11(a)(1) of change 2 to AR 27-20 incorrectly omitted the word "code" after the word "office".)

2. Dollars obligated during the prior month.

3. Dollars obligated year to date through the prior month. (This total is to include the amount paid for both personnel and tort claims.)

4. Dollars deposited during the prior month. (Do not include money recovered through the affirmative claims program and deposited with miscellaneous receipts of the U. S. Treasury.)

5. Dollars deposited year to date through the prior month.

Under paragraph 15-11(b), AR 27-20, additional information is to be furnished with July's monthly report due by the seventh day of August. Offices are to report on the dollars required for the last two months of the current fiscal year and estimate the dollars needed for the next fiscal year.

Reports may be furnished by telephone (AUTOVON 923-7009/4345) DDN (JACSZ@OPTIMIS-PENT.ARPA), or Facsimile (AUTOVON 923-6708). Offices that furnish this information by mail must ensure delivery by the seventh calendar day.

Accurate reporting by every claims office is essential for the efficient use the Army's claims dollars. Offices that experience an unusual requirement for Claims dollars may *never* obligate more dollars than their cumulative quarterly target. Additional funds may be authorized only by the Budget and Information Management Office. Major Lazarek.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office, and TJAGSA Administrative and Civil Law Division

Labor Law

Contracting Out

On April 17, 1990, the Supreme Court issued its decision in *Department of Justice, IRS v. FLRA*, 1990 WL 42784 (U.S. 1990), in which it held that a union proposal to allow issues concerning contracting out decisions to be challenged in the negotiated grievance procedure (NGP) was a violation of management rights and was therefore nonnegotiable. The union proposal was based on OMB

Circular A-76, which requires agencies to have an administrative appeal procedure to resolve complaints about cost comparison determinations or decisions to contract out where no cost comparison is required. The union's proposal was to use the NGP to meet the agency requirement. FLRA determined that the proposal was negotiable under 5 U.S.C. §§ 7114 and 7121 because it involved allegations of a violation of a law, rule, or regulation concerning conditions of employment. The authority held that it did not interfere with management's 5 U.S.C. § 7106 right to make determinations concerning contracting out because the proposal would merely contractually recognize an existing external limitation on management's right to contract out.

The Supreme Court held that FLRA's construction of the Labor Management Relations Act was unreasonable. The court strictly construed the language of 5 U.S.C. § 7106 that nothing in that chapter would affect management's delineated rights. FLRA erred in its interpretation that the language of section 7121 concerning grievances made the proposal negotiable because the authority's decision was inconsistent with the section 7106 phrase. The court rejected FLRA's argument that the restrictive phrase in section 7106(a)(2)—that decisions must be made in accordance with "applicable law"—would include other sections of the act (i.e., section 7121) as an applicable law. The term "applicable law" refers to laws outside of the act. However, the court did not decide whether the term "applicable law" would include implementing rules and regulations concerning contracting out, but did state that it is permissible (but not inevitable) that the term would apply to some, but not all, regulations. The court sent the case back to the lower court for it or the FLRA to consider this issue.

The court also rejected FLRA's argument that the proposal was not a substantive limitation on management rights, but rather only a contractual recognition of the external requirement placed on the agency by OMB. The statute does not empower unions to enforce all external limitations on management rights, but only limitations contained in applicable laws. From a perspective involving only union rights, the agency could have completely ignored the OMB A-76 requirements except to the extent that the agency had to comply with applicable law concerning contracting out.

The decision, in which six justices joined, leaves open the possibility that the union proposal may yet be sustained. Justice Stevens, dissenting, would have found the proposal flatly nonnegotiable. Justices Brennan and Marshall would have found the proposal negotiable. The decision also raises significant questions about the impact of the management rights provision on the grievability of any matter that arguably falls within section 7106.

Reconsideration of Arbitrator Awards

OPM has exclusive authority under 5 U.S.C. § 7703(d) to ask an arbitrator to reconsider a grievance arbitration award adverse to the government. After reconsideration, OPM may seek judicial review. In *Newman v. Corrado*, 897 F.2d 1579 (Fed. Cir. 1990), an arbitrator declined to reconsider a grievance arbitration award on the ground that he lost jurisdiction over the matter once he made an award. Based on the authority of section 7703(d), the court ordered reconsideration notwithstanding the *functus officio* doctrine.

Exclusivity of Grievance Procedure

In *Carter v. Gibbs*, 1990 U.S. App. LEXIS 4609 (Fed. Cir. Mar. 30, 1990), the Federal Circuit decided that the failure to except overtime claims from a collective bargaining agreement cut off access to judicial remedies for overtime pay under the Fair Labor Standards Act (FLSA). Sitting en banc, the court contradicted a panel decision (883 F.2d 1563) that it had earlier vacated. The en banc decision affirmed a district court dismissal of an action by seven revenue officers and auditors who had been joined by several hundred other employees. A negotiated grievance procedure is the exclusive remedy for grievable matters under 5 U.S.C. § 7121 unless excepted by the parties or by statute. The employees argued that the exclusivity language in section 7121 could not repeal by implication the express right to sue under the FLSA. To the contrary, concluded the circuit court, the unambiguous language of section 7121 does not allow implication of an additional exception to 7121 to allow suits under the FLSA.

Negotiability—"Excessively Interfere"

Nuclear Regulatory Commission v. FLRA, 895 F.2d 152 (4th Cir. 1990), denied enforcement of the FLRA's ruling that the NRC was required to negotiate over a proposal that the agency freeze bargaining unit reassignments and competitive promotions in the event of a RIF. The court held that implementation would "excessively interfere" with management's rights, but enforced the order to NRC to negotiate over proposals that excepted service employees be provided the same bump and retreat rights as competitive service employees in the event of a RIF as those proposals did not "excessively interfere" with management rights. Reconsideration has been sought.

Unfair Labor Practices—General Counsel Discretion

A union successfully forced the general counsel to reconsider a decision not to issue a ULP complaint in *Montana Air Chapter No. 29, Assoc. of Civilian Technicians, Inc. v. FLRA*, 1990 WL 29442 (9th Cir. Mar. 22, 1990). At issue was the National Guard Bureau's refusal to approve a CBA provision allowing technicians to wear

civilian attire while performing civilian duties. The court overcame the presumption against reviewability of general counsel decisions based on the 1985 Supreme Court case of *Heckler v. Chaney*, which allows review when an agency decision is based solely on a belief that it lacked jurisdiction or the agency has adopted a policy so extreme that it has abdicated its statutory responsibilities. The court found that the general counsel improperly grafted a bad faith requirement onto the ULP definition in 5 U.S.C. § 7116(a) and wrongly concluded that no change in conditions of employment was contemplated by the refusal to approve the CBA provision. Deciding that the general counsel had jurisdiction, the court remanded to the district court so that the general counsel could consider the merits of the ULP charge. The general counsel is considering seeking rehearing. While this decision gives unions leverage against the general counsel, there is no similar authority for agencies to challenge an affirmative decision to issue a complaint.

Equal Employment Opportunity Law

Standing

In *Sternburg v. DODDS*, 90 FEOR 3156 (Jan. 8, 1990), on reconsideration the commission confirmed that a former agency employee had standing to pursue an EEO complaint for actions occurring after termination. On appeal, the MSPB had found several of the charges against appellant were not substantiated. However, pursuant to request, the agency had forwarded a copy of the employee's Notice of Removal to a third party. Appellant complained that release of the information jeopardized appellant's current employment. The commission noted there was no evidence in the record as to why the agency sent the information. The commission assumed the information was sent in response to an inquiry regarding appellant's employment status. Even though appellant was no longer an employee at the time the information was released, the commission found the agency's actions constituted reprisal for protected activities undertaken during the employment relationship. The commission noted that had the agency merely confirmed appellant was no longer an employee, rather than release information as to why appellant had been terminated, standing might not have been found. This case underscores the need for caution in releasing information about former employees.

Handicap Discrimination

In *Stephens v. U.S. Postal Service*, 90 FEOR 3155 (Jan. 8, 1990), a mixed case, the commission concurred with the MSPB that petitioner was not a victim of handicap discrimination (alcoholism). The agency had reduced petitioner's removal to a fourteen-day suspension when it learned of his alcohol abuse and granted him leave to enter an alcohol rehabilitation program. Having been given a firm choice between participation in the program and discharge, petitioner dropped out of the program after two sessions. Petitioner was subsequently ordered to leave the building for using offensive language and insubordination within view of postal patrons. The MSPB found that petitioner was a handicapped person and that his misconduct was directly related to his alcoholism, but also held the agency had reasonably accommodated his handicap. In concurring, the commission noted that agencies are not required to engage in "an endless series of accommodations."

Religious Discrimination

In *Joyner v. Department of the Navy*, 90 FEOR 3138 (Dec. 21, 1989), a mixed case, the commission concurred with the MSPB that petitioner was not a victim of religious discrimination (born-again Christian). Petitioner believed other employees were trying to convert her to Satanism and had caused her to endure pain by casting spells. Agency witnesses denied this and testified she had attacked a co-worker with her purse and tried to choke him. The agency had referred petitioner to its employee assistance program and to a psychiatrist. The MSPB administrative judge found petitioner's actions were disruptive and had an adverse effect on other employees, and that the agency took reasonable action by referring petitioner to its counselling program. The commission held petitioner established a prima facie case; however, the agency met its burden of proving that any action short of removal would have been an undue hardship.

Sex Discrimination

In *Ramirez v. Dept. of the Navy*, 90 FEOR 3136 (Dec. 19, 1989), the commission affirmed the agency's decision that appellant was not a victim of sex discrimination. She alleged a co-worker sexually harassed her by reporting to her supervisor that she was doing her job improperly, placing a postcard of a semi-nude male on her desk, telling her about the "unbelievable sex" he had with other males while on vacation, discussing how another co-worker's parents had abused him as a child, staring at her and giving her "dirty" looks, laughing at her, and trying to run her over with a forklift. She testified that a psychiatrist had diagnosed her as having "situational anxiety." The co-worker denied all allegations except the postcard incident, claimed he and appellant were good friends, and agreed not to have any further contact with appellant. Another female co-worker testified that the alleged harasser had never harassed her, nor had she seen him harass others. The commission held that appellant failed to establish a prima facie case in that the behavior of which she complained was not "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment" The commission observed that "... sexual flirtation or innuendo, even vulgar language that is trivial or merely

annoying, generally does not establish a hostile environment. Moreover, unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment."

Attorneys' Fees

On reconsideration in *Canady v. Department of the Army*, 90 FEOR 3141 (Dec. 27, 1989), EEOC held that 29 C.F.R. § 1613.271(d)(1)(iii) did not bar an award of paralegal fees and costs to an attorney representative who was a government employee. The regulation prohibits compensation for legal representation by an employee, but costs are not compensation. The commission did emphasize that it was the complainant's burden to prove entitlement to costs by specific evidence. Whereas paralegal fees normally would not be awardable because they are part of an attorney's normal overhead (the same as clerical services normally are), the unique situation in this case must be closely scrutinized to ensure that the employee does not indirectly receive compensation for his services. The commission relied upon an Office of Government Ethics opinion that an attorney representative who is an employee should not share in any money derived from fees for the representational services of his paralegal wife. Appellant did not meet his burden of proof that the fees for his paralegal wife were for non-representational services, so the fees were denied. Based upon the total request for $19,691.46 for attorneys' fees, the commission awarded $92.75 in costs.

Civilian Personnel Law

Excepted Service Employees

Appeal rights for excepted service employees are closer to reality with the approval of the "Civil Service Due Process Amendments Act" (H.R. 3086) by the Senate Governmental Affairs Committee on Mar. 29, 1990. The House passed the bill Nov. 6, 1989. Senate passage is virtually certain. The legislation currently provides for a two-year trial period before rights would vest. Some positions, primarily those in intelligence and security, would be exempt.

Civilian Drug Testing

Unions continue to challenge drug testing programs with mixed success. In the District of Columbia, the district court in *National Treasury Employees Union v. Yeutter*, 58 U.S.L.W. 2480, 1990 WL 32736 (D.D.C. Jan. 18, 1990), declined to enjoin the Department of Agriculture's reasonable suspicion testing, post-accident testing, and random testing of motor vehicle operators. The court did strike down testing for plant quarantine inspectors and computer specialists because the government's interests did not outweigh privacy interests. Plant inspectors are neither law enforcement officers nor instrumental in the national campaign against illegal drugs. In addition information stored in USDA computers, though somewhat confidential, does not involve national security, law enforcement, or otherwise reach the level of sensitivity warranting random testing. In *American Federation of Government Employees and National Treasury Employees Union v. Sullivan*, Nos. 88-3594 and 90-0205 (D.D.C. Mar. 2, 1990), Judge Harold Greene preliminarily enjoined portions of the Department of Health and Human Services drug testing program. Judge Greene enjoined reasonable suspicion testing (unless it is triggered by on-the-job behavior) and post-accident testing. Although post-accident testing was limited by HHS to accidents resulting in death, hospitalization, or damage over $1,000, he concluded that such testing is too invasive absent evidence of fault or illegal activity. Judge Greene refused to enjoin random testing of workers with top secret security clearances and of motor vehicle operators, finding that the safety related aspects of their work offset their expectation of privacy.

The Navy and Air Force are under attack in California. In *American Federation of Government Employees v. Cheney*, Nos. 88-3823, 89-4112, 89-4443 (N.D. Cal., March 15, 1990), a nationwide stay of the Navy's program was imposed in December because of the Navy's failure to provide adequate notice to the union; in January 1990 the stay was extended pending decision on a preliminary injunction. Judge D. Lowell Jensen has now enjoined testing following accidents with motor vehicles or equipment because the Navy failed to link testing and protection of public health and safety. Jensen criticized the program for failing to specify a threshold level of severity in terms of potential harm and actual personal injury or property damage. He was also troubled with the discretion of commanders to establish their own triggering event for testing which deprives employees of notice of circumstances under which they could be tested. The judge also enjoined random testing of employees in most jobs involving maintenance of transportation or mechanical equipment, many employees in identified "national security" slots, employees in drug/alcohol rehabilitation jobs, and almost all jobs labelled "protection of life and property jobs." According to Judge Jensen, although testing in some of these jobs was appropriate, testing should be barred so long as the categories were excessively inclusive. Meanwhile, a NFFE motion for a preliminary injunction against Air Force random and reasonable suspicion testing, filed in February, has been consolidated in the Eastern District of California with an AFGE suit to declare the same program unconstitutional, originally filed in September 1989. Systematic testing in the Air Force has yet to begin.

Attorneys' Fees

Appellant appealed an agency action reassigning him from one GS-14 position to another. The AJ had originally dismissed the appeal for lack of jurisdiction.

MSPB found that the reassignment was actually a demotion from GS-15, and it had ordered that he be restored to the GS-15 position. Because its ruling on the jurisdiction question had been dispositive of the appeal, the board did not consider appellant's discrimination and reprisal claims. Appellant filed a motion for attorney fees, including fees for work performed on an EEO complaint, a reprisal claim before OSC, and a Title VII suit in district court. The AJ awarded fees under section 7701(g)(1), but found that the time spent in EEO and Office of Special Counsel complaints and Title VII suit was not compensable. The board ruled that fees were awardable under the more liberal standards of section 7701(g)(2), which allows fees under Title VII standards for appeals with a finding of discrimination. MSPB liberally construed section 7702(g)(2) to apply if a prevailing appellant pleads facts which, if proved, would form a prima facie case of discrimination.

An actual finding of discrimination is not required. The board awarded fees for time spent on the discrimination and reprisal complaints, relying on *Nadolney v. EPA*, 30 M.S.P.R. 561 (1986). It found that the two complaints arose from a common core of facts that were the basis for and contributed to the success of the MSPB appeal. The board did agree with its AJ that the hours spent on the district court suit were not allowable. It found that the suit was independent of, rather than in furtherance of, the board appeal. Because appellant's attorney was entitled to fees under section 7701(g)(2), he was also entitled to costs such as expert witnesses, transcripts, depositions, subpoenas, and duplicating. *McGovern v. EEOC*, 42 M.S.P.R. 399 (1989).

Handicap—Firm Choice

In *Calton v. Department of the Army*, 1990 WL 42662, No. DE07528810362 (MSPB Apr. 4, 1990), the board decided that it will "henceforth require agencies to provide a 'firm choice' between treatment and termination to employees handicapped by alcoholism." Calton was a rubber equipment repairer who had been removed for repeated offenses of AWOL and intoxication during duty hours. After an AJ sustained the removal, Calton went to the EEOC, which determined that he was handicapped and that he had been denied a firm choice. The commission returned the case to the board, which acceded to the commission's rule.

Qualified Handicapped Employee

MSPB applied its ruling in *Hougens v. USPS*, 38 M.S.P.R. 135 (1988), in affirming the removal for off-duty misconduct of a criminal investigator of the Bureau of Alcohol, Tobacco, and Firearms. Appellant had been drinking with his supervisor in a bar. Refusing his supervisor's offer of a ride, he used his government vehicle to transport a friend to another bar and then continued driving. He was driving the wrong way on an interstate highway when he collided with another car, killing a two-year old child in that car. After he pleaded guilty to homicide by vehicle and DUI, BATF removed him for that conduct and the vehicle misuse arising from transporting the non-government employee. In a pre-*Hougens* decision, the AJ had found that BATF had failed to accommodate appellant's alcoholism and reduced the penalty to a thirty-day suspension for the vehicle misuse. On review, the board found that appellant's misconduct fell under the *Hougens* category of misconduct "which, by its very nature, strikes at the core of the job or the agency's mission, or is so egregious or notorious that an employee's ability to perform his duties or to represent the agency is hampered." The board concluded that appellant's misconduct "struck at the core of the agency's mission and his duties as a law enforcement officer." Because appellant was therefore not a "qualified handicapped individual," BATF had no duty to accommodate. *Wilber v. Department of Treasury*, 42 M.S.P.R. 582 (1989).

Reinstatement to Former Position

MSPB offered guidance on an agency's duty to reinstate a successful appellant to his former position. In one appeal, the agency had placed appellant in a GS-5 administrative position instead of the GS-5 "active duty" position that he had held previously. Appellant had argued that he was entitled to restoration to the active duty position at a GS-7 level, to which the agency normally promoted employees after twelve months of successful employment. In ruling that appellant had no right to a promotion that he might have received absent the removal, the board observed that there was no mandatory requirement that the agency promote its GS-5's to GS-7. In fact, appellant was the only employee in his group who did not successfully complete his training, so he was not qualified for the promotion. The board did find, however, that the agency had not presented a compelling justification for not returning appellant to an "active duty" position. The board will examine whether "the actual duties or responsibilities to which the employee was returned are either the same or substantially equivalent in scope and status to the duties and responsibilities held prior to the wrongful discharge.... Further, any change in the scope or duties of the restored position must be supported by an agency showing of compelling interest." The agency argument that it could not trust appellant with sensitive records was inconsistent with its failure to detail appellant out of his active duty position prior to his removal. *Rickels v. Department of Treasury*, 42 M.S.P.R. 596 (1989).

The board decided other petitions for enforcement involving reinstatement of successful appellants. In *Gamel v. Department of Navy*, 43 M.S.P.R. 168 (1989), MSPB refused to accept the Navy's justification for not placing appellant in the same position that he had held prior to his removal. Speculative beliefs of intentional falsification of an employment application or the same

charges that the board had eventually reversed do not constitute compelling reasons for reassigning an appellant. Likewise, in *Taylor v. Department of Treasury*, 43 M.S.P.R. 221 (1990), the board rejected as speculative the agency's rationale for not placing appellant in her former position, which was reclassified from GS-9 to GS-10. The agency presented no evidence in support of its argument that appellant would have rotated out of the position before it had been reclassified. Because the reclassification resulted from the upgrade of subordinate positions, rather than from a change in duties, appellant was entitled to placement in the GS-10 position. In another appeal, however, the board did approve an agency's placement of appellant in a position other than his former position, where his duties had required him to transport explosives. The Navy's refusal to certify appellant to transport explosives was based on a DUI conviction subsequent to his removal. The board accepted appellant's unsafe driving record, which was worse than it had been at the time of his removal, as a compelling reason for placing appellant in a position which did not require transporting explosives. *Burrell v. Department of Navy*, 43 M.S.P.R. 174 (1990).

Security Clearance

The Navy had removed appellant for selling marijuana on duty. In settling an MSPB appeal, the Navy substituted a sixty-day suspension for violating the shipyard commander's policy and agreed to destroy all personnel records related to the marijuana charges. It subsequently used information from those records in an action to revoke the employee's security clearance. It then proposed his removal, and appellant petitioned for enforcement of the settlement agreement. The Navy admitted having failed to destroy the records, as the settlement required. The board framed the issue before it as whether the Navy's request for an investigation, accompanied by records it had agreed to destroy, resulted in the revocation of appellant's security clearance. It remanded the appeal to receive evidence on that issue. The board did, nevertheless, state, "If appellant establishes on remand that the agency's violation resulted in his loss of clearance, the administrative judge shall order the agency to cancel the proposal to remove appellant from his position and to reassign him to a nonsensitive position of the same grade." *Byron v. Department of Navy*, 42 M.S.P.R. 665 (1989).

MSPB Jurisdiction

In *Jones v. Department of Army*, 42 M.S.P.R. 680 (1989), the board held that it had jurisdiction over a RIF appeal that alleged discrimination despite a negotiated grievance procedure. The appellants, whose motor pool jobs had been transferred to GSA and then contracted out, were covered by a collective bargaining agreement that did not exclude reductions in force from its grievance procedure. Though the NGP would normally provide appellants' exclusive avenue of redress in a RIF, appellants' allegations of discrimination gave the board jurisdiction under 5 U.S.C. § 7121(d).

Employee Denial of Misconduct

In *Grubka v. Department of the Treasury*, 858 F.3d 1570 (Fed. Cir. 1988), the court refused to sustain the IRS's charge of falsification, which had been based on appellant's denial of having engaged in improper conduct at an off-duty party organized by IRS trainees. The court stated that an employee has a right to deny a charge and plead not guilty. The denial would not be a separate offense. The court also held that the denial by Grubka did not concern a matter of "official interest to the IRS, because it had nothing to do with the work of that agency." In *Greer v. U.S.P.S*, 43 M.S.P.R. 180 (1990), the Postal Service demoted appellant for storing and using intoxicating beverages on agency premises and for providing false information to his supervisor when questioned about the alcohol use. The board distinguished *Grubka* and reasoned that the alcohol use charge involved a matter of "official interest" to the service, unlike the misconduct in question in *Grubka*. Relying on *U.S. v. Knox*, 396 U.S. 77 (1969), the MSPB held that an employee can decline to answer questions about misconduct or can answer honestly. But, if the employee knowingly and willfully provides false information, that would be a separate offense. It sustained both charges, but it mitigated the penalty to a suspension because, among other reasons, the deciding official had considered what he characterized as appellant's continued lying after being issued the notice of proposed demotion. Considering matters extraneous to the charges in the proposal was improper. Absent those considerations, the deciding official may have imposed a lighter penalty. *Greer v. USPS*, 43 M.S.P.R. 180 (1990).

The board further discussed *Grubka* in another appeal, *Allen v. Department of Air Force*, 43 M.S.P.R. 192 (1990). There the board sustained a charge of falsifying facts in an official investigation where appellant had denied the misconduct that also formed the basis for his removal. The other charges were abuse of authority, filing a false travel voucher, and attempting to intimidate a witness in an official investigation. The board found that those charges "all pertain to the appellant's actions while engaged in the official work of the agency." As in *Greer*, intentionally providing false information was a separate offense.

Office of Special Counsel Stays

OSC can seek stays of personnel actions under 5 U.S.C. § 1214(b)(1). A forty-five-day stay can be granted ex parte by one member of board based on reasonable grounds to believe a prohibited personnel practice has been or is about to be taken. The whole board grants

additional stays after the employing agency is given an opportunity to comment. The Whistleblower Protection Act does not specify an evidentiary standard for additional stays. In *Special Counsel v. FEMA*, HQ12089010012 (Apr. 11, 1990), the board extended an initial forty-five-day stay of a ten-day suspension for ninety days, holding that additional stays may be granted unless they are clearly unreasonable.

Criminal Law Division Notes

Criminal Law Division, OTJAG

Supreme Court—1989 Term, Part III

Colonel Francis A. Gilligan
Lieutenant Colonel Stephen D. Smith

Declining to "turn the illegal method by which evidence in the Government's possession was obtained to . . . a shield against contradiction"[1] of an accused's testimony, the Court held in *Michigan v. Harvey*[2] that statements obtained in violation of an accused's sixth amendment right to counsel may be used to contradict the accused's in court testimony. Chief Justice Rehnquist authored the 5-4 majority opinion,[3] finding no reason to distinguish sixth amendment violations from fifth amendment/*Miranda*[4] violations insofar as admissibility for impeachment of the accused's testimony.[5] Justice Stevens,[6] on the other hand, argued that even admitting such statements solely for impeachment sanctions a violation of the core values protected by the sixth amendment.[7]

Military Rule of Evidence 304(b)(1), permitting some inadmissible yet voluntary statements to be used as impeachment evidence, makes no distinction between fifth amendment/*Miranda* and sixth amendment rights to counsel. The rule in the military is simply that statements taken in violation of article 31(b) warnings, the requirements for counsel, or the exercises of these rights, (Military Rules of Evidence 305(a), 305(d), 305(e), 305(f) and 305(g)) are admissible only to impeach the accused's testimony by contradiction. The Drafters' Analysis fails to reveal any distinction between the fifth amendment/*Miranda* and sixth amendment rights to counsel, instead indicating only that the military rule is premised on *Harris v. New York*.[8] *Harvey* would seem, therefore, to support the constitutionality of Military Rule of Evidence 304(b)(1).[9]

The majority did not discuss the ethical rules applicable to prosecutors, nor did the majority discuss whether the law enforcement officers were agents of the prosecutor and thus subject to ethical limitations. Perhaps the Court would view direct violations of professional ethics as more significant and justifying a rule of complete inadmissibility. The dissenters indicate that *Harvey* differs from other impeachment cases since Harvey had been formally charged. At this time "the ethical prosecu-

[1] Harris v. New York, 401 U.S. 222, 224 (1971) (quoting Walder v. United States, 347 U.S. 62, 65 (1954)).

[2] 46 Crim L. Rep. (BNA) 2159 (U.S. Mar. 5, 1990).

[3] Justices White, O'Connor, Scalia, and Kennedy joined in the opinion of the court. 46 Crim. L. Rep. at 2159.

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

[5] 46 Crim. L. Rep. at 2161.

[6] Justices Brennan, Marshall, and Blackmun joined, dissenting. *Id.* at 2162.

[7] *Id.*

[8] 401 U.S. 222 (1971).

[9] Recently amended by Executive Order 12708 (Mar. 23, 1990), Military Rule of Evidence 304(b)(1) provides, "Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f), or the requirements concerning counsel under Mil. R. Evid. 305(d), 305(e), and 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement." Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 304(b)(1) [hereinafter MCM, 1984, and Mil. R. Evid., respectively].

tor has sufficient evidence to convict."[10] Further, "work of the agents was trial preparation, pure and simple."[11] Once a defendant is known to be represented by counsel, as a matter of ethics if the prosecutor wants to talk to the defendant, he must give notice to the opposing counsel.[12] The more likely conclusion to be drawn from the Court's failure to consider ethical rules is that violations of ethical standards do not result in statements that are completely inadmissible.[13] Thus, prosecutors and prosecutorial agents who deal directly with accused persons, rather than through known defense counsel, may create useful impeachment evidence, leaving other remedies to be pursued for the ethical violation.

The foregoing silence on possible ethical violations and the basic holding of *Harvey* create a terrific incentive for police officers to obtain inadmissible statements. In fact, the case could even encourage prosecutors to tacitly encourage law enforcement efforts to interview persons in violation of sixth amendment protections. As can be seen from the statements in *Harvey*, these otherwise inadmissible statements are very effective for impeachment. They may even prevent an accused from testifying at all once the defense is notified of this impeaching evidence. As Justice Stevens stated: "The police would have everything to gain and nothing to lose by repeatedly visiting with the defendant and seeking to illicit as many comments as possible about the pending trial. Knowledge that such conversations could not be used affirmatively would not detract from the State's interest in obtaining them for their value as impeachment evidence."[14] Prosecutors must carefully avoid this temptation; sanctioning such conduct is not only unprofessional, it violates Military Rule of Evidence 305(e). Nevertheless, the rationale of the Supreme Court in *Harvey* and Military Rule of Evidence 304(b)(1) would permit statements obtained in violation of *Edwards v. Arizona*,[15] *Michigan v. Jackson*,[16] *Arizona v. Roberson*,[17] and *Massiah v. United States*,[18] which are otherwise voluntary and the result of a knowing and intelligent waiver of counsel to be admitted for impeachment purposes.

Boyde v. California[19] deals with two instructional issues relating to capital cases: 1) Whether the allegedly mandatory nature of a California jury instruction violated the eighth amendment by preventing individualized assessment of the appropriateness of the death penalty; and 2) whether, as instructed, the jurors were precluded from considering all relevant mitigating evidence, specifically non-crime related extenuating factors. As noted earlier in this series, death penalty litigation is largely case specific, and of minimal guidance unless the military capital sentencing scheme suffers from the same defect as the sentencing scheme involved. The resolution of the issues presented in *Boyde* does not directly effect the military capital sentencing scheme,[20] but the standard adopted by the Court for assessing instructions should have long term significance.

The challenged mandatory instruction stated, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole."[21] Finding that this issue was controlled by *Blystone v. Pennsylvania*,[22] the Court rejected the challenge to the foregoing instruction. *Blystone* provides that "individualized sentencing ... is satisfied by allowing the jury to consider all relevant mitigating evidence."[23]

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[10] 46 Crim. L. Rep. at 2164. While some prosecutors may have the case completed at the time of the indictment, others may wait until they are close to trial before the investigation is done. As the Chief Judge of the New York Court of Appeals said, "Any district attorney will tell you in confidence.... that a grand jury would indict 'a ham sandwich' if a prosecutor told it so." N.Y Times, Feb. 28, 1990, at B1.

[11] 46 Crim. L. Rep. at 2164 n.10.

[12] ABA Rules of Professional Conduct, Rule 4.2 (1983); Dep't of Army, Pam. 27-26, Legal Services, Rules of Professional Conduct for Lawyers, Rule 4.2 (31 Dec. 1987). *See also* ABA Model Code of Professional Responsibility, DR 7-104(A)(1)(1980). The Attorney General has indicated that these provisions do not apply to undercover investigations. Memorandum from Dick Thornburg, Attorney General, to all Justice Department litigators (June 9, 1989).

[13] *Cf.* United States v. Hammad, 846 F.2d 864 (2d Cir. 1988), *revised*, 858 F.2d 834 (2d Cir. 1988). The original opinion indicated that where there is a violation of the disciplinary rule it may lead to suppression of the evidence. The revised opinion indicated that the original result may unduly hamper investigations where criminals have attempted to immunize themselves by hiring "house counsel." *But see* United States v. Ankeny, 30 M.J. 10 (C.M.A. 1990) (unauthorized disclosure of confidential communications may not be used by the government).

[14] 46 Crim. L. Rep. at 2164.

[15] 451 U.S. 477 (1981).

[16] 475 U.S. 625 (1986).

[17] 108 S. Ct. 2093 (1988).

[18] 377 U.S. 201 (1964).

[19] 46 Crim. L. Rep. (BNA) 2172 (U.S. Mar. 5, 1990)

[20] MCM, 1984, Rule for Courts-Martial 1004, properly implemented and instructed upon, does not involve issues similar to those evoked by the California instructions at issue.

[21] 46 Crim. L. Rep. at 2174.

[22] 46 Crim. L. Rep. (BNA) 2147 (U.S. Feb. 28, 1990).

[23] 46 Crim. L. Rep. at 2149.

A 5-4 majority[24] of the Court noted that the mandatory nature of the California instruction was not alleged to have interfered with the jury's consideration of mitigating evidence. The Court rejected the claim that capital sentencing schemes must leave the jury free to decline to impose the death penalty even if aggravating circumstances are found to outweigh mitigating circumstances.[25]

The second challenged instruction directed the jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[26] Boyde claimed that this instruction precluded the jurors from considering any mitigating circumstance not related to the crime, specifically evidence of "his impoverished and deprived childhood, his inadequacies as a school student, and his strength of character in the face of these obstacles."[27] To resolve this second issue, the Court fashioned a uniform standard with which to assess claims that jury instructions impermissibly restrict consideration of relevant evidence.

Conceding that prior cases had been less than clear, the Court stated:

> [I]t is important to settle upon a single formulation for this Court and for other courts to employ in deciding this kind of federal question. Our cases, understandably, do not provide a single standard for determining whether various claimed errors in instructing a jury require reversal of a conviction..... We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that a jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition.[28]

Although the plain language of the challenged instruction in *Boyde* seemingly limited consideration of extenuating circumstances to only those extenuating "the gravity of the crime," the Court found no reasonable likelihood that the jurors interpreted the instruction to restrict consideration of mitigating circumstances. Several factors were relied upon to support this conclusion: other instructions specifically permitted consideration of mitigating evidence; the defense presented four days of background and character evidence; and defense counsel's argument stressed that the jury should consider any extenuating evidence.[29]

This standard for reviewing claims that instructions impermissibly limit consideration of evidence will make it more difficult for appellants to prevail. This is so because the Court intends that its standard be applied to the "jurors" rather than to "how a single hypothetical 'reasonable' juror could or might have interpreted the instruction."[30] In addition the Court hints that the standard is to be applied based on the premise that during the deliberative process "commonsense understanding of the instructions in the light of all that has taken place at the trial [is] likely to prevail over technical hairsplitting."[31] Thus, not only will the Court apparently credit the collective wisdom of a jury, but the Court will also require a finding of broad impact before reversing a conviction for this type of instructional error.

Last year, in *Teague v. Lane*,[32] the Supreme Court adopted a standard that severely limits the potential for collateral attack on state convictions. "[N]ew rule[s] of constitutional law will not be applied to cases on collateral review unless the rule comes within one of two narrow exceptions"[33]: 1) when the new rule decriminalizes a class of private conduct;[34] or 2) when the new rule

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[24] Chief Justice Rehnquist authored the majority opinion in which Justices White, O'Connor, Scalia, and Kennedy joined. Justice Marshall filed a dissenting opinion in which Justice Brennan joined, and in which Justices Blackmun and Stevens joined in part.

[25] 46 Crim. L. Rep. at 2174. "But there is no such constitutional requirement for unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Id.* (quoting Franklin v. Lynaugh, 487 U.S. 164, 181 (1988) (plurality opinion)).

[26] 46 Crim. L. Rep. at 2173 (quoting instruction 8.84.1, 1 California Jury Instructions, Criminal (4th ed. 1979), which was amended subsequent to the subject trial).

[27] 46 Crim. L. Rep. at 2175.

[28] 46 Crim. L. Rep. at 2175.

[29] 46 Crim. L. Rep. at 2176-77.

[30] 46 Crim. L. Rep. at 2175. The Court is also motivated to create a standard that will "accommodate the concerns of finality and accuracy." *Id.* This motivation apparently reflects the Court's growing displeasure with prolonged litigation, particularly in capital cases.

[31] 46 Crim. L. Rep. at 2175.

[32] 44 Crim. L. Rep. (BNA) 3129 (U.S. Feb. 22, 1989).

[33] Saffle v. Parks, 46 Crim. L. Rep. (BNA) 2193 (U.S. 5 Mar. 1990).

[34] "Under the first exception, a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Butler v. McKellar, 46 Crim. L. Rep. (BNA) 2165, 2168 (U.S. Mar. 5, 1990) (citations and quotations omitted).

reflects fundamental, criminal procedure values.[35] In *Saffle v. Parks*[36] the Supreme Court applied the new standard to a habeas request based on an "anti-sympathy instruction" given in a capital case.[37] Petitioner claimed that the instruction violated the eighth amendment by precluding consideration of certain mitigating evidence. A majority of the Court[38] determined that federal habeas relief was not available. The claim constituted a request for a new rule of law that fit within neither of the exceptions warranting retroactive application to petitioner's case.

Change 4 to the Manual for Courts-Martial

On 23 March 1990, President Bush signed Executive Order No. 12708. This order implements Change 4 to the Manual for Courts-Martial. Change 4, effective 1 April 1990, results from the annual review of the Manual completed in 1987. Executive Order No. 12708 was published in the Federal Register on 27 March 1990. An Army message, dated 271700Z Mar 90 from DA WASHDC//DAJA-CL, transmitted a summary of Change 4 and the complete text of Change 4, including the Discussion and Analysis. Offices that did not receive this message may request a copy from:

HQDA (DAJA-CL)
ATTN: MAJ Mason
Pentagon Room 2D434
Washington, D.C. 20310-2206

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[35] "[A] new rule may be applied on collateral review if it requires the observance of those procedures that ... are implicit in the concept of ordered liberty." Butler v. McKellar, 46 Crim. L. Rep. at 2168 (citations and quotations omitted).

[36] 46 Crim. L. Rep. (BNA) 2193 (U.S. Mar. 5, 1990).

[37] The challenged instruction stated, "You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence." 46 Crim. L. Rep. at 2193.

[38] Justice Kennedy authored the opinion of the Court, in which Chief Justice Rehnquist and Justices White, O'Connor, and Scalia joined.

Notes From the Field

Video Teleconferencing

Video teleconferencing has proven to be a very useful tool for the Judge Advocate General's Corps. It allows face-to-face conferences without wasting time, money, and energy in travel. This note discusses some of the past video teleconferences and highlights a few of the known future uses.

MG Suter introduced the OTJAG and USALSA Division Chiefs to video teleconferencing when he hosted a Division Chiefs meeting and linked up with the TRADOC and FORSCOM SJA's on 19 August 1988. Since then, many Division Chiefs have used video teleconferencing. For example, the LAAWS Project Office has conducted training with various FORSCOM and TRADOC offices and will conduct other training as set out in a memorandum signed by the Executive. Additionally, the Legal Assistance Office held a conference with FORSCOM and TRADOC Legal Assistance Offices and intends to hold future conferences each quarter. Trial Defense Service held a CONUS RDC teleconference and will schedule future conferences with a quarterly inspection. Mr. Ralph Avery, Litigation Division, held a seminar on bankruptcy law and practice using teleconferencing for AMCCOM, TROSCOM, AVSCOM, TACOM, MICOM, and CECOM. These are a few examples where Division Chiefs have made good use of the Pentagon video teleconference facility and hope to do more in the future.

The U.S. Army Claims Service has used video teleconferencing for training in personnel claims adjudication. Future plans include other adjudication training conferences and training focusing on affirmative claims and carrier recovery. Also, Major Harold Brown, Claims Service, used teleconferencing for interviews with claimants and witnesses. His experience was that in addition to the convenience for him, the witnesses were comfortable with teleconferencing. He intends to use teleconferencing for future interviews and negotiations.

For the past several years, The Judge Advocate General has stressed the need to be innovative. The use of modern technology to better train members of the Judge Advocate General's Corps and to provide the best legal services possible is vital in this era of reduced funding. The innovative use of the technology of video teleconferencing is an important tool that can pay great dividends to the Corps. Lieutenant Colonel Michael E. Schneider, Assistant Executive, OTJAG.

Legal Administrator Technical Certification Training at Fort Hood, Texas

"An officer appointed by warrant by the Secretary of the Army, based on a sound level of technical and tactical competence. The warrant officer is the highly specialized expert and trainer who, by gaining progressive levels of

expertise and leadership, operates, maintains, administers, and manages the Army's equipment, support activities, or technical systems for an entire career." (Warrant Officer Definition, AR 611-112.)

With those words, the Army Chief of Staff in 1985 launched a new warrant officer training system that requires certification at each training level. This system is divided into four phases: Warrant Officer Candidate School [formerly the Warrant Officer Entry Course], the Warrant Officer Technical Certification Course (WOTCC), Senior Warrant Officer Training, and Master Warrant Officer Training.

The WOTCC phase for MOS 550A, Legal Administrator, has been conducted at Fort Hood, Texas, since December 1986. Soldiers selected for accession as legal administrators travel TDY to Fort Hood for a course that, upon successful completion, culminates in their appointment to WO1 and subsequent assignment to a staff judge advocate office.

For more than three years, Fort Hood has been the primary site for the technical certification of warrant officer candidates in MOS 550A. This course consists of twelve weeks of training at the three Fort Hood SJA offices. The close proximity of these three GCM-level jurisdictions make Fort Hood uniquely prepared to provide an intensive and comprehensive certification program. The assigned legal administrators at each office provide training in and expose the candidates to every aspect of a legal administrator's job at division and corps level.

The training provided in the certification course is geared to meet the on-the-job requirements of the active component legal administrator. These responsibilities include, but are not limited to, the duties listed in AR 611-112. These duties are summarized below:

> The legal administrator manages the overall military and civilian administrative operations of an Army legal office. He or she serves as the Information Management Officer, directing all Staff Judge Advocate information management functions. In this regard, the legal administrator directs the training of personnel in the operation of computers and related equipment, and analyzes legal operations to determine where automated systems will enhance legal services. One of the legal administrator's main responsibilities is to be the Chief Paralegal Administrator for administrative law, claims, criminal law, legal assistance, international law (where applicable), and administrative support services. In so doing, he or she evaluates management data to determine how to maximize existing legal support and improve the effectiveness and efficiency of Staff Judge Advocate operations. The legal administrator develops and prepares reports pertaining to manpower staffing and utilization programs, manpower survey documents, and organizational studies for legal services systems. He or she develops and monitors fiscal requirements, executes program budget guidance, and authenticates funding obligations.

Since 1986, twelve candidates have graduated from the course. Consistent with the actual legal administrator job requirements summarized above, their training has included extensive exposure to automation; personnel, training, property, and supply management; budgeting; library administration; security; staff organization and functions; and general legal office administration. Physical fitness training is provided at each location, and the Army Physical Fitness Test is administered during the course.

One of the major advantages of the Fort Hood course is that its program of instruction can be tailored to individual candidate strengths and weaknesses. It also incorporates actual ongoing SJA office activities so that training efforts produce real results and benefits, not only for the candidates, but also for the host offices. Candidates participate in three different SJA operations and view three "role model" legal administrators in action. Trainees have found that the opportunity to work for three different staff judge advocates has been very helpful in making the transition from enlisted to warrant officer status.

As mentioned above, warrant officer candidates have participated in a number of SJA office activities at Fort Hood. A substantial amount of automation equipment was acquired between 1987 and 1989 and integrated into Fort Hood SJA operations. A manpower survey of the III Corps SJA office was conducted in 1988, and the Corps SJA moved into a new headquarters building in 1989. The Corps headquarters came equipped with a local area network, and the SJA offices at 1st Cavalry Division and 2nd Armored Division have also gained similar capabilities since 1987. The post claims office has been using the U.S. Army Claims Service computer program, and claims vouchers have been prepared and produced electronically via the installation's host computer system since 1988. In 1989, Fort Hood's first year of involvement with the electronic filing of income tax returns, 3,958 returns were transmitted and accepted by IRS. In 1990, 7,404 returns were filed electronically. Legal administrator candidates have played a part in each of these projects.

At the time of this writing, eight candidates have been selected for technical certification in the near future. The following is some brief guidance for upcoming course attendees.

Once selected and given training dates, candidates should ensure that they complete a physical examination prior to departing their permanent duty stations for Warrant Officer Candidate School. This examination must be less than eighteen months old as of the projected date of

appointment to WO1. Also, it is very important that the losing finance office program all projected leave and TDY entries into the JUMPS Army Computer System (JACS). Each candidate should verify his or her presence in JACS at the TDY training locations. Without continuous and vigilant verification, a "No Pay Due" situation may result.

Finally, it is essential that all candidates have a basic working knowledge of JAGC-standard computer hardware and software (i.e., ENABLE) prior to their arrival at the certification course. Without a firm foundation in this area, it is very difficult for a candidate to learn all of the required computer skills during the relatively short period of time spent at Fort Hood. A good "head start" in computer training should be an important element in every prospective candidate's pre-appointment processing.

Legal administrator certification is alive and well at Fort Hood. Candidates can expect to find the course a challenge. Training at Fort Hood provides an outstanding opportunity to improve technical competence, contribute to the legal operation of three SJA offices, and make the transition from enlisted to warrant officer status in an enjoyable and "real world" environment. CW3 Michael P. Sebek, Legal Administrator, Office of the Staff Judge Advocate, III Corps and Fort Hood.

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

JAGC-USAR Professional Development and Assignment Patterns for the 1990's

Dr. Mark Foley, Ed.D
Chief, Personnel Actions Branch

Introduction

The Army is entering its most difficult period of adjustment since the end of the Vietnam War, perhaps since the end of World War II. During this time frame there will have to be a complete review of the threat the United States faces around the world. The resulting threat assessment will bring about a realignment of U.S. military objectives, facilities, personnel, and equipment. The anticipated result is that there will be a reduction in both active duty forces and reserve component troop program units. Soldiers, as well as the Army, must be prepared to meet the challenges of the 1990's and beyond. Each individual must make an assessment of his or her potential and must determine how he or she can realign his resources to ensure a successful career.

To assist JAG officers and the Corps in meeting the challenge of the new decade, a conceptual model for JAGC professional development and assignment patterns has been proposed. The model is designed to assist individuals in planning their military education requirements and progressive assignments to enhance career opportunities. The model will also assist leaders and managers in selecting officers for JAGC leadership positions. Some of the questions most often heard around the Corps are: How do I prepare myself to make 0-6? How do I make myself competitive to be selected as military law center commander or ARCOM staff judge advocate? This model is not a cook book, you cannot expect to add a pinch of CAS[3] and a cup of JAGSO duty and bake a perfect career. However, you can use it as a road map. It will show you the way, but you have to decide whether to take the interstate or the scenic route.

Professional Development Training

The Army has proposed a new RC Officer Education System to be implemented by 1993. This change would increase the number of required professional development courses, but would reduce the duration of most courses. In addition to the required courses, there are a number of training opportunities that enhance the individual's ability to perform in positions of increasing responsibility. It is each JAG officer's responsibility to evaluate his or her near and long term requirements and seek out additional training opportunities.

JAGC Officer Basic Course

JAOBC is designed to provide basic branch orientation and training for reserve component officers who are receiving a commission in the Judge Advocate General's Corps, without concurrent orders to active duty. This course serves as branch qualification for company grade officers. Completion of the course is required as a prerequisite for promotion to captain. Reserve component

JAGC officers who have never attended a resident officer basic course must attend Phase I (required military subjects) in residence (2 weeks) at Fort Lee, Virginia. Phase II (required legal subjects) may be taken by correspondence (78 hours) within the first year of appointment.

JAGC Officer Advanced Course

JAOAC is designed to provide a working knowledge of the duties and responsibilities of field grade Judge Advocate General's Corps officers. This course is the non-resident version of the Judge Advocate Officer Graduate Course. JAOAC serves as branch qualification for officers to serve in field grade JAGC positions. Completion of this course is a prerequisite for enrollment in the Combined Arms and Service Staff School (CAS^3). JAOAC consists of two legal subject phases. Phase I is a correspondence phase. Phase II is a two-week resident phase, taught at TJAGSA. The course should be taken between the second and fifth years of commissioned service.

Combined Arms and Service Staff School

CAS^3 is designed to develop officers to function as staff officers at battalion, brigade, and divisional level. This course is especially important for JAGC officers in enhancing their military knowledge base and providing the staff skills needed to interface with the non-JAGC staffs in the headquarters. Completion of this course serves as the military education requirement for promotion to major. CAS^3 consists of three phases: Phase I is taught at a USARF school in eight IDT weekends; Phase II is taught by correspondence; and Phase III is two weeks in residence at a USARF school location. This course is usually taken between the fifth and ninth year of service.

Command and General Staff Course

The Command and General Staff Course (CGSC) is taught in three parts. Parts I and II are prerequisites for promotions, and part III is required for designated command and staff positions.

CGSC, part I, has its focus on tactical war fighting. Completion of this course is a prerequisite for promotion to lieutenant colonel. The course consists of two parts, available either by correspondence or USARF school. This course should be completed between the ninth and fourteenth year of commissioned service.

CGSC, part II, is focused on the operational level of war. Completion of this course is a prerequisite for promotion to colonel. The course consists of two parts, each being available either by correspondence or USARF school. This course should be taken between the fifteenth and twenty-first year of commissioned service.

CGSC, part III, is designed primarily to serve as a pre-command course. This course may be required of some reserve component officers, depending on their duty position, but will not be associated with promotion.

Senior Service College

The Army War College (AWC) is designed to prepare officers for duty as commanders and staff officers at the highest levels of the Army. The course is not a promotion prerequisite, but enhances any officer's ability to perform in senior officer positions. The AWC is a two-year correspondence course, consisting of correspondence phases and two, two-week resident phases at Carlisle Barracks, Pennsylvania. Selection for this course is by a centralized board at ARPERCEN. Application procedures are announced annually. This is the only correspondence course considered by the Army as a senior service college. This course should be completed between the twenty-first and twenty-sixth year of commissioned service.

Military Continuing Legal Education

Each year, The Judge Advocate General's School offers specialized continuing legal education courses at Charlottesville and at over thirty other locations around the world. Taught by TJAGSA faculty, these courses provide an essential update in a particular field of law. It is anticipated that in the near future, military CLE will be required for all reserve component JAGC officers to maintain their basic professional competence as military lawyers. JAGC officers not acquiring a specified number of military CLE credits per year will be removed from their TPU or IMA positions.

Individuals may apply for TJAGSA resident CLE training, which varies in length from three days to three weeks. These courses provide practice oriented continuing legal education for military attorneys. TJAGSA also provides weekend, on-site CLE training at twenty CONUS locations and at selected OCONUS sites. JAGC officers should plan for attendance at one CLE course each year.

Judge Advocate Triennial Training

Judge Advocate Triennial Training (JATT) is conducted at TJAGSA in the functional missions of the JAGSO. JATT is conducted on a three-year cycle, with a different functional area emphasized each year. The training is required for personnel assigned to a JAGSO. JATT is unit training and will be used to evaluate the unit's capability to perform its mission. JATT may evolve into a JAGSO ARTEP conducted at installations around the country during annual training.

Assignment Patterns

Assignment of all judge advocates is the responsibility of The Judge Advocate General, and assignment policies and regulations implement TJAG's statutory authority. However, this discussion is directed toward assignment patterns that prepare reserve component judge advocates for senior troop unit and individual mobilization augmentee positions.

Company Grade Assignments

Company grade JAGC assignments should allow the officer an opportunity to learn to be both a military lawyer and a soldier. An officer at this stage of a career should have a wide variety of experiences. It is understood that at the same time the JAGC officers are learning their military craft, they are also beginning full-time civilian careers. However, high standards of participation and performance must be demanded of the officers in their military duties.

Troop program unit JAGC officers should be assigned to junior JAGSO and SJA section positions. It is not advisable to assign judge advocates with less than four years experience to SJA sections where they are the sole or senior JAGC officer. During this period of the JAGC officer's career, there are a number of professional development educational requirements. Nevertheless, the individual should be required to attend training with the unit at least three out of five years.

Individual mobilization augmentee JAGC officers should be assigned to junior IMA positions with active duty division or garrison units. IMA supervisors should provide training in military legal requirements of the position and ensure that junior officers are exposed to soldier experiences. When possible, SJA's should arrange to pair up new JAGC officers with a platoon leader of a local line unit for a one or two day orientation on life as a soldier. Supervisors should counsel the junior officers on legal and soldier performance. Junior JAGC officers in IMA positions should be encouraged to drill, for points only, at least part of the year with a troop program unit in their home area.

Non-JAGC TPU assignments for company grade officers are not advisable until the individual has at least eight years of commissioned service. These assignments can be beneficial to both the JAGC and the soldier. The assignments may broaden the individuals' perspectives concerning the mission of the Army and enhance their ability to perform at higher level positions later in their careers. Assignment to non-JAGC positions must be approved by TJAG and will be for a period not to exceed three years.

Company grade officers should not be assigned to Control Group, Reinforcement (usually called the IRR), except in unusual circumstances. Appointment of new JAGC officers must be for a TPU or IMA position. However, if JAGC officers are assigned to the IRR, they must be especially careful in managing their careers to ensure that they are able to complete their annual training requirements in JAGC-related assignments. It should be considered highly undesirable for company grade JAGC officers to spend two or more years in the IRR.

JAGC Assignments for Majors

JAGC officers will usually have at least nine years commissioned service when promoted to major. This is a mid-level grade with opportunities to supervise other judge advocates. This is also a time to develop more specific skills and experiences to qualify for senior JAGC positions. Troop program unit JAGC officers should begin to seek out assignments as JAGSO Team Directors and GOCOM staff judge advocates. These assignments should follow developmental TPU or IMA experiences relating to the type of law practiced by the unit. Examples of developmental assignments for JAGC position qualification are listed below.

GOCOM staff judge advocates (O-4) should have TPU or IMA experience as a member of a staff judge advocate section, SJA for a small unit, member of Courts-Martial or Defense Team, counsel for Trial Defense Service, or as a TJAGSA instructor in criminal law, admin/civil law, or operational law.

Team directors of functional JAGSO detachments should have experience as members of like detachments, or TPU/IMA assignments directly related to the type of law practiced by the unit.

JAGC Assignments for Lieutenant Colonels

JAGC officers will usually have at least fifteen years of commissioned service when promoted to lieutenant colonel. This is the beginning of senior level assignment and performance expectations. Officers at this level must have the legal expertise, soldier skills, and confidence to deal effectively with Army commanders in the performance of their assignment. Lieutenant colonel JAGC officers should serve as role models and mentors for junior officers and must be capable of counseling and assisting them in developing their skills and careers.

Troop program unit JAGC officers should be competing for principal lieutenant colonel, tenured positions, e.g., division SJA, GOCOM SJA (O-5) or military judge (O-5). The degree to which a JAGC officer is competitive for these assignments will be reflected in prior developmental assignments. Examples of developmental assignments are listed below.

Division and GOCOM (O-5) staff judge advocates should have experience as a member of an SJA section, team director of a functional JAGSO detachment, a

military judge (O-5), SJA or deputy SJA of a command or agency as an IMA, or a TJAGSA instructor.

For the new O-5 military judge positions, an individual should have experience as a team director (trial/defense), division or GOCOM SJA, or served as an IMA at COMA, CMR, TDS, or as a TJAGSA instructor in criminal law.

JAGC Assignments for Colonels

JAGC officers will usually have at least twenty years of commissioned service when promoted to colonel. For all but a handful of JAGC officers, this is their most senior level of service to the Army. Development of the officer is no longer a major professional objective. This is a period of full utilization of the officer's talents, experience, and training. At this level, officers must perform effectively with senior Army commanders. Colonels must lead, discipline, teach, and develop the field grade JAGC officers under their technical and command supervision.

Troop program unit JAGC officers, through training and experience, have prepared themselves for maximum use of their skills, abilities, and talents as LSO/MSO commanders, ARCOM staff judge advocates, and senior military judges. Prior assignments should offer the experience necessary to succeed at these assignments.

Assignment as an ARCOM staff judge advocate should be as the result of experience as a division or GOCOM SJA, LSO commander, or military judge. IMA experience, which directly relates to experience need to qualify for this position, includes SJA or deputy SJA (O5-O6) of a major Army command or a senior TJAGSA instructor (O5-O6).

Selection as an LSO/MSO commander should be at least partially based on successful experience as a division/GOCOM/ARCOM staff judge advocate, chief LSO section, or military judge. IMA experience as an SJA/Dep SJA of a major Army command would also qualify.

Senior military judge positions need JAGC officers with experience as a military judge (05), LSO commander, or ARCOM SJA. IMA experience as a military judge, TJAGSA criminal law instructor, as a member of COMA or CMR, will enhance an individual's selection potential for an O-6 military judge position.

Summary

The role of the JAGC officer is to function as a staff officer and professional legal advisor and practitioner in all areas of the law.

This conceptual model has been developed to assist both the Corps and the individual, to ensure that each JAGC officer will be able to perform effectively any mission assigned.

At this time, the new Reserve Component Officer Education System and the JAGSO reorganization have not been implemented. However, we are now on the eve of these changes and need a strong sense of direction for the 1990's to meet major Army changes and to succeed in our mission.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1990

July 9-11: 1st Legal Administrator's Course (7A-550A1).

July 10-13: 21st Methods of Instruction Course (5F-F70).

July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).

July 16-18: Professional Recruiting Training Seminar.

July 16-20: 2d STARC Law and Mobilization Workshop.

July 16-27: 122d Contract Attorneys Course (5F-F10).

July 23-September 26: 122d Basic Course (5-27-C20).

July 30-May 17, 1991: 39th Graduate Course (5-27-C22).

August 6-10: 45th Law of War Workshop (5F-F42).

August 13-17: 14th Criminal Law New Developments Course (5F-F35).

August 20-24: 1st Senior Legal NCO Management Course (512-71D/E/40/50).

September 10-14: 8th Contract Claims, Litigation & Remedies Course (5F-F13).

September 17-19: Chief Legal NCO Workshop.

3. Civilian Sponsored CLE Courses

September 1990

8-14: PLI, Patent Bar Review Course, New York, NY.

9-14: NJC, Alcohol and Drug and the Courts, Reno, NV.

9-14: NJC, Forensic Medical and Scientific Evidence, Reno, NV.

9-14: NJC, Special Court: Medical and Scientific Evidence, Reno, NV.

10: USTA, The Trademark Law Revision Act as Applied, Arlington, VA.

10-11: PLI, Lender Liability Litigation: Recent Developments, New York, NY.

10-14: ESI, Federal Contracting Basics, Washington, DC.

12-13: ESI, Claims and Disputes, Washington, DC.

13-14: PLI, Creative Real Estate Financing, San Francisco, CA.

13-14: ALIABA, Employment Law in Insurance and Banking Organizations, New York, NY.

13-14: PLI, Estate Planning Institute, San Francisco, CA.

13-14: PLI, Institute of Banking Law and Regulation, New York, NY.

13-14: PLI, Institute on Employment Law, New York, NY.

13-14: ALIABA, New England Securities Regulation Institute, Boston, MA.

13-14: PLI, Secured Creditors and Lessors Under Bankruptcy Reform Act, San Francisco, CA.

13-14: PLI, Securities Law for Non-Specialist, New York, NY.

16-21: NJC, Judicial Writing, Reno, NV.

17-18: ALIABA, Municipal Solid Waste: Disposal, Regulation, Finance, Washington, DC.

18-21: ESI, Contract Pricing, Washington, DC.

23-27: NCDA, Trial Advocacy, San Francisco, CA.

23-28: NJC, Advanced Evidence, Reno, NV.

23-October 5: NJC, General Jurisdiction, Reno, NV.

24-25: ALIABA, Health Care in the '90s and Beyond, Washington, DC.

24-25: PLI, Institute on Employment Law, Chicago, IL.

25-28: ESI, Preparing and Analyzing Statements of Work and Specification, Washington, DC.

30-October 4: NCDA, Public Sector Legal Practice, New Orleans, LA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1990 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually

Jurisdiction	Reporting Month
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For address and detailed information, see the January 1990 issue of *The Army Lawyer*.

5. U.S. District Court for the District of Columbia Adopts Renewal Certification and Fee Requirement

The U.S. District Court for the District of Columbia has adopted Local Rule 701.1, which requires that each member of that Bar renew his or her membership every three years. A renewal certificate must be filed by 1 July of every third year that an attorney has been admitted to practice before the court. The deadline for filing initial renewal certificates for attorneys previously admitted was 1 April 1990. Attorneys admitted after 1 July 1986 will pay an initial renewal fee of $10.00, and attorneys admitted after November 1989 do not need to file an initial renewal certificate.

Attorneys who fail to file a timely renewal certificate and pay the renewal fee will be provisionally removed from the list of members in good standing. For further information, contact the United States District Court, P.O. Box 18427, Washington, DC 20036 or call (202) 862-5521.

6. Inactive Status May Affect Application for Admission to Another Jurisdiction

Many military lawyers elect to maintain an inactive status in their home state Bars in order to avoid paying higher annual registration fees. Judge advocates should realize that this may adversely influence a subsequent application for reciprocal admission to another state Bar. Some states require an active license for five out of the last seven years or three out of the last five years. Consequently, judge advocates who have maintained an inactive status may face a bar exam in order to be admitted to practice in another state.

Active duty judge advocates who anticipate applying for admission to another jurisdiction should ascertain the exact requirements for admission from the appropriate State licensing authority.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron

Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
AD B136200	Fiscal Law Deskbook/JAGS-ADK-89-3 (278 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS-ADK-86-1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
AD B135492	Legal Assistance Guide Consumer Law/JAGS-ADA-89-3 (609 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
AD B136218	Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135453	Legal Assistance Guide Real Property/ JAGS-ADA-89-2 (253 pgs).
AD A174549	All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/ JAGS-ADA-85-2 (56 pgs).
AD B114052	All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
AD B114053	All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
AD B114054	All States Law Summary, Vol III/ JAGS-ADA-87-7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
AD B116103	Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
AD B124120	Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).
*AD-B141421	Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).
AD-B124194	1988 Legal Assistance Update/JAGS-ADA-88-1
*AD-B142445	Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90 (175 pgs).

Claims

AD B108054	Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS-ADA-84-7 (76 pgs).
AD B139524	Government Information Practices/ JAGS-ADA-89-6 (416 pgs).
AD B100251	Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
AD B139522	Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).
AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

AD B139523	Law of Federal Employment/JAGS-ADA-89-4 (450 pgs).
AD B139525	Law of Federal Labor-Management Relations/JAGS-ADA-89-5 (452 pgs).

Developments, Doctrine & Literature

AD B124193	Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B100212	Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).
AD B135459	Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).
*AD B140529	Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).
*AD B140543	Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 135-9	Army National Guard and Army Reserve Participation in Joint Service Reserve Component Facility Boards	29 Mar 90
AR 381-1	Security Controls on the Dissemination of Intelligence Information	12 Feb 90
Cir 11-88-1	Army Programs, Interim Change 101	30 Mar 90
Pam 350-100	Extension Training Materials Consolidated MOS Catalog	19 Mar 90

By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

Official:

WILLIAM J. MEEHAN II
Brigadier General, United States Army
The Adjutant General

Distribution: Special

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS–DDL
Charlottesville, VA 22903–1781

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